DOCUMENT RESUME

ED 158 389 95 EA 010 798

AUTHOR Long, David C.; And Others
TITLE Legal Constraints on Decentralized Decision-Making in the Public School System of the District of Columbia.
INSTITUTION Lawyers' Committee for Civil Rights Under Law, Washington, D.C.
SPONS AGENCY Ford Foundation, New York, N.Y.; National Inst. of Education (DHEW), Washington, D.C.
PUB DATE Apr 77
NOTE 200p.

EDRS PRICE MF-$0.83 HC-$10.03 Plus Postage.
DESCRIPTORS Administrator Role; Boards of Education; Citizen Participation; Community Control; Court Litigation; *Decentralization; Decision Making; Elementary Secondary Education; Federal Legislation; Parent Participation; Power Structure; Teacher Participation
IDENTIFIERS District of Columbia

ABSTRACT

Faced with a legal mandate to equalize educational resources available to its public elementary schools, can the Board of Education of the District of Columbia respond effectively to the public pressure for decentralization of its decision-making systems? The answer may be determined through the responses to two further questions: to what extent can the board legally involve local parent and citizen boards in decision-making at the school and regional levels; and to what extent can administrators and teachers at these levels legally participate in such decision-making? To determine the board's power to delegate or subdelegate its functions to local boards, it is necessary to analyze the District of Columbia Code, court decisions, union contracts, and other legal requirements. The authority of the board itself is restricted by its position in the District of Columbia's governing structure. This document first analyzes the extent of the board's authority and second considers in detail several major functions that might be decentralized, as well as the effects such decentralization could have. In general it is suggested that opportunities for decentralization exist and can be legally supported to an extent previously unexpected by past board members. (Author/PGD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED158389

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

LEGAL CONSTRAINTS ON DECENTRALIZED DECISION-MAKING IN THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA

David C. Long
Michael J. Gaffney
F. Lorraine Bodi

SCHOOL FINANCE PROJECT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 15th Street, N.W.
Washington, D.C. 20005
202/628-6700

April, 1977

EA 010 798

PREFACE

In this study we have analyzed the legal constraints on decentralized decision-making in the public school system of the District of Columbia. For purposes of this analysis, the term "decentralized decision-making" has been interpreted broadly to mean greater involvement of parents and school building staff in certain decisions that affect the delivery of educational services to the children of the District of Columbia. The principal mechanism considered for achieving greater involvement has been local school boards acting in cooperation with local school staff and with the school system's administration.

The general legal issues related to decentralized decision-making are analyzed in extensive detail in Part One of the study. Two general conclusions have emerged from this analysis. First, the present legal framework governing public education in the District of Columbia is sufficiently flexible to enable the Board of Education to increase the present degree of decentralized decision-making substantially. Second, the Board of Education already has authority to promulgate rules and regulations that have the force and effect of law. Although there are certain limits to this authority, the Board's rule-making authority and the Board Rules provide a means of legally structuring and defining the extent of decentralized decision-making. The condition and content of the

present Board Rules suggest that past members of the Board of Education may not have fully realized the potential of the Board's rule-making authority as a means of increasing decentralized decision-making.

More specific analysis which pertains to the decentralization of particular Board functions is contained in Part Two of the study. As the result of our examination of such areas as budget, personnel, curriculum and textbooks, the use of school buildings, building maintenance, and supplies and equipment, we have set out the specific parameters for Board decentralization with examples of how decentralization might be structured. It is our conclusion that substantial decentralization through delegation to local boards and staff may be accomplished for most of these functions.

In short, if the Board of Education decided, as a matter of policy, to increase the level of decentralized decision-making in the public school system, this analysis would provide legal support for the policy and would suggest the legal parameters of such a policy, both in general (Part One) and with regard to specific Board functions (Part Two).

CONTENTS

	Page
INTRODUCTION AND OVERVIEW	1
A. Purpose and Organization of the Study: Decentralization and Delegation of Authority	1
B. Delegation and Subdelegation of Authority	4
1. Delegation and Subdelegation Defined and Distinguished	4
2. Determining the Legal Intent to Allow Delegation or Subdelegation	7
3. Degrees and Type of Delegation and Subdelegation	8
C. Decentralization in the District of Columbia Schools	10
1. History of Decentralization in the D.C. Schools	10
2. Accomplishing Decentralization Under the Present Legal Structure	17
PART ONE: THE LEGAL PRINCIPLES APPLICABLE TO DELEGATION OR SUBDELEGATION INVOLVED IN DECENTRALIZATION	19
A. The Intent of Congress Concerning Delegation and Subdelegation	19
1. Congressional Intent Evidenced in the Self-Government Act	19
2. Congressional Intent Concerning the General Authority of the Board Under the Self-Government Act	22
a. Introduction	22
b. Overview of the Powers of the Board	25
c. Reconciling the Powers of the Board and the Council	28
1. Introduction	28
2. Legislative History of the Self-Government Act	29
3. The Pre-Self-Government Act Relationships Among Congress, the Appointed Council and the Elected Board	35
4. Three Interpretations of the Relationships Among Congress, the Board and the Council	44

Page

B. Judicial Interpretations of Intent to Permit Delegation or Subdelegation 54

1. Decisions Pertaining to Delegation and Subdeleation in D.C. 54

2. The Board's Concurrent Legislative Power as a Basis for Decentralization 61

a. Introduction 61
b. The Federal Framework Regarding Legislative Delegation 61
c. The State Framework Regarding Legislative Delegation 62

3. The Board's Power to Subdelegate if Considered an Administrative Body 69

a. Introduction 69
b. The Federal Doctrine of Subdelegation 69
(1) Introduction 69
(2) The Degree of Subdelegation 73
(3) The Interests Served by Subdelegation 76
(4) The Interests Affected by Subdelegation 78
(5) Safeguards Against Arbitrary Action 79
(6) Summary 80
c. The State Doctrine of Subdelegation 81
(1) In General 81
(2) Subdelegation by School Boards 86
d. Which Subdelegation Doctrine Applies to Decentralization by the Board 93

C. Decentralization Involving Local Boards 97

1. Introduction 97
2. Delegation to Private Parties 99
a. Introduction 99
b. The Federal Courts 101
c. The State Courts 104
3. Teachers' Interests and Collective Bargaining 109
a. In General 109
b. Collective Bargaining in D.C. 112
c. Summary 115
4. Parental Interests in the Education of their Children 116
a. Introduction 116
b. Judicial Recognition of Parental Interests 116
c. Summary 123

Page

5. Structuring Decentralization Through Local Boards 125
   a. Introduction 125
   b. Composition of Local Boards 125
   c. The Interests Served by Decentralization Through Local Boards 126
   d. The Interests Affected by Delegation 128
   e. The Extent of Delegation to Local Boards 130
   f. Ensuring Board Control of Local Boards 132
      (i) Board rules in general 132
      (ii) Creation of an employment relationship 133
      (iii) Contracting with local boards 134
      (iv) Delegating the authority to recommend 137

D. Decentralization Involving Board Employees 139
   1. Introduction 139
   2. Principals 139
   3. Regional Administrators 140
   4. General Considerations 141

PART TWO: ISSUES RELATING TO THE DECENTRALIZATION OF PARTICULAR FUNCTIONS 143

A. Introduction 143

B. Decentralizing the Budget Process 146

   1. Introduction 146
   2. Limitations on Board Authority to Delegate Budgeting 146
   3. Limitations on the Exercise of Decentralized Budgetary Authority 149
      a. Introduction 149
      b. Limitations on Decentralization Created by the Line-Item Requirement and the Necessity for Mayoral, Council, and Congressional Approval 150
      c. Limitations Imposed by the Equalization Requirements of Hobson v. Hansen and Title I 153

Page

C. Decentralizing Personnel Decisions 158

1. Introduction 158
2. Limitations on Board Authority to Delegate Personnel Decisions 159
3. Board Delegation of Authority With Respect to Particular Personnel Actions 166
   a. Staff Appointment 166
   b. Staff Transfers 171
      (i) Voluntary transfers 172
      (ii) Involuntary transfers 173
   c. Staff Dismissal 174
      (i) Local board and staff role in contractual dismissal procedures 176
      (ii) Local board and staff role with respect to the status of probationary employees 180

D. Decentralizing Curriculum and Textbook Decisions 182

1. Introduction 182
2. Curriculum 182
3. Textbooks 183
4. Special Education 184

E. Decentralizing Decisions Concerning the Use of School Buildings 186

F. Decentralizing Decisions Concerning Building Maintenance 188

G. Decentralizing Decisions Concerning Supplies and Equipment 190

INTRODUCTION AND OVERVIEW

A. Purpose of the Study: Decentralization and Delegation of Authority

The following analysis will consider to what extent decentralization is permissible within the present legal structure governing the Board of Education of the District of Columbia (the Board). In this regard, it will attempt to answer two key questions: (1) to what extent can the Board involve local boards made up of parents and other citizens at the school site or regional levels (local boards) in the decisions affecting their schools or regions; and (2) to what extent can principals, other administrators at these levels and teachers participate in such decisions?

The project of which this analysis is a part has focused primarily on the impact of the order in Hobson v. Hansen,[1] requiring the equalization of certain educational resources among the public elementary schools in the District of Columbia.[2] A related

1/ 327 F. Supp. 844 (D.D.C. 1971)

2/ This has been a joint project of the D.C. Citizens for Better Public Education, the Lawyers' Committee for Civil Rights Under Law and the Education Policy Research Institute of ETS. The first year of the study was funded by the National Institute of Education, the second year by a grant from the Ford Foundation. Other publications resulting from the project include J.C. Baratz, A Quest for Equal Educational Opportunity in a Major Urban School District: The Case of Washington, D.C. (June, 1975) and Issues Concerning the Construction of an Equalization Plan for the Allocation of School Resources in the District of Columbia (June, 1976); L. Ferrara and A. Poller, A School-By-School Reporting System for the District of Columbia Public Schools: An Outline for Action (July, 1976); and M. Swaim, Who Decides What for the D.C. Public Schools (April, 1977).

issue, from which this portion of the project derives, is the compatibility of the legal mandate to equalize resources and various proposals for decentralization of the public school system of the District of Columbia.

Since the District's schools are subject to court ordered equalization of resources and since the Board has experimented with decentralization and is implementing a more general decentralization proposal, the District is a particularly appropriate location for exploring the specific nature of the interaction between equalization and decentralization issues as well as the more general legal issues pertaining to the Board's power to authorize local boards and school and regional staff (local staff) to assume greater responsibility for the functioning of their schools or regions.

Under most proposals for school decentralization local boards or staff would perform functions now performed by central office staff, the superintendent or the Board itself. For example, local boards or staff would select personnel, decide priorities, develop budgets, determine the curriculum. The central legal issue posed by such proposals concerns the legal power of the Board to delegate or subdelegate such functions to local boards or staff.

Thus, a major focus of the analysis which follows is on the present provisions of the D.C. Code (the Code), court decisions, union contracts, and other legislative requirements applicable to the Board as they relate to the decentralization/delegation issue. The focus takes on added complexity because the Board does not have unfettered discretion in the exercise of its control. Certain provisions of the Code might be interpreted as requiring the Board itself to make particular decisions, i.e., they might be interpreted as vesting nondelegable discretion in the Board. Furthermore, in order to transfer authority to local boards or staff, the Board must at least have that authority to begin with. Presently, certain functions relating to the operation of the public schools are performed by other agencies in the District of Columbia government, e.g., building repairs, and are not under the legal control of the Board. In other areas the Board shares specific responsibilities with other D.C. agencies. For example, employee classifications and salary ranges must have the concurrence of the D.C. Council.

More specifically, in Part One of this analysis we consider whether the Board should be viewed as exercising legislative power and subject to the rules concerning delegation or whether the Board

is purely an administrative agency subject to subdelegation standards. Since federal and state standards for subdelegation differ and state law appears to be in flux, we will also reflect on the consistency and reasonableness of the different subdelegation standards that the D.C. courts might be asked to apply. Part Two considers in detail several major functions which might be decentralized and the problems created by these more specific limitations on Board power. In Part Two we also will suggest possible ways of maximizing the input of local boards and staff, while minimizing the risk that their input would be considered an invalid delegation or subdelegation under principles discussed in Part One.

B. Delegation and Subdelegation of Authority

1. Delegation and Subdelegation Defined and Distinguished

Delegation generally refers to the transfer of legislative power by a legislative body to another body, agency, official or jurisdiction.[3/] Subdelegation, on the other hand, means the transmission of authority from governing boards or heads of administrative agencies to subordinates.[4/]

3/ See generally, Davis, Administrative Law Treatise, §2.01 et. seq. (1958)

4/ Id. at §9.01 et seq.

The distinction between delegation and subdelegation is often blurred in court opinions. Frequently both are referred to simply as delegation. The essential difference between the concepts stems from the differences between a body viewed as having legislative powers and one seen as exercising administrative authority. Legislative authority when transmitted is considered delegated; administrative authority when transmitted is subdelegated. For example, state legislatures typically delegate legislative power to municipalities: and municipalities, in turn, may legislate with respect to local affairs and in certain cases delegate to municipal boards, agencies and offices the authority to regulate areas within the municipality's jurisdiction, e.g., zoning, traffic, health. Here both the state legislature and the municipality have "delegated" because both are considered to have legislative power. If, however, a state legislature delegates authority to a state administrative agency to regulate, any attempt by that agency to authorize its subordinates to carry out its functions probably would be considered a subdelegation.[5/] While the municipality may be viewed as exercising legislative powers, the state agency would probably be characterized by courts as exercising administrative authority.

5/ See discussion pp. 63-69, 81-91, infra.

In the above example, the administrative agency may have been granted broad rulemaking powers authorizing it to "legislate" in the same sense that a state legislature or municipality legislates. Yet as an administrative agency, it would likely be subject to different rules than the municipality if it seeks to transmit authority to subordinates or establish boards to assist it -- for the standards pertaining to legislative delegation and administrative subdelegation are somewhat different, particularly in state courts.

It is difficult to predict which precedent the D.C. courts would apply to delegation-subdelegation issues involving the Board. In part at least this will likely depend on how the Board is characterized. The Board is at the same time a Congressionally created body, part of the municipal government, and the governing board for the District's schools. It also functions in some respects as a state department of education. Should issues arise concerning the transfer of authority in decentralization, it is likely that the first issue for a court to resolve would be which among the conflicting bodies of precedent to apply, i.e., should state or federal doctrines be applied.

2. Determining the Legal Intent to Allow Delegation or Subdelegation

The extent to which a governing body of a governmental entity can delegate or subdelegate authority is primarily a question of the intent of the legislative body creating the entity. Delegation or subdelegation specifically authorized by the legislature generally is unassailable if the standards for such delegation or subdelegation are met.[6/]

Nearly all of the cases pertaining to delegation and subdelegation have arisen because the legislation creating the entity was silent about delegation or subdelegation. In the absence of express legislative authority, the courts have had to fashion legal standards for determining the extent to which delegation and subdelegation is permissible. In general, federal courts are more liberal in permitting subdelegation than state courts. Federal courts typically presume that Congress intended to permit subdelegation within certain limits unless it expressed a contrary intent or sensitive constitutional rights are at stake.[7/] State courts today appear to be moving slowly in the same direction.

6/ See pp. 62-69, infra.

7/ The delegation of legislative power issue seldom arises in the federal courts since this is largely an issue pertaining to geographical subunits of government which are delegated legislative power. Other than the District of Columbia, the only congressionally created geographical subunits of government are federally controlled areas lacking statehood.

3. Degrees and Types of Delegation and Subdelegation

Probably the greatest difficulty in considering issues of delegation and subdelegation stems from the fact that these terms take in a host of different types of activities. Functions that may be delegated or subdelegated include both the authority to establish rules of general applicability ("rulemaking" or "legislating") and to make determinations based on particular facts ("adjudication" or "quasi-adjudication"). Moreover, the degree of decision-making power that may be transmitted to subordinates or others with respect to either of these functions covers a wide spectrum. At the one extreme is the complete delegation of rulemaking or adjudicating authority without the power to regulate, review or withdraw the delegated power in the future. Such would amount to a complete alienation of power through delegation. At the other end of the spectrum is incorporation of staff or local board recommendations into the Board's decision-making process. Many courts would not view a structure incorporating such recommendations as involving any form of delegation or subdelegation.[8/] However, in reality the power to make recommendations may be tantamount to having the power to decide.

Furthermore, between these ends of the spectrum there are many degrees of delegation and subdelegation which can occur. The authority to make an initial decision or to make rules may be delegated or subdelegated, with the delegating board or official retaining the

8/ See p. 83, infra.

authority to review and disapprove of the delegated action.[9/] Such review may be automatic or may be left to the initiation of those dissatisfied with the delegated action. The range of possibilities for degree of delegation and review become particularly apparent where adjudicative or quasi-adjudicative functions are delegated or subdelegated. For example, if a hearing is to be held, the function of presiding and hearing evidence may be delegated. So may the review of any transcript made, fact finding, and the responsibility for an initial decision. However, the more functions that are delegated or subdelegated, the more the final decision is likely to reflect the imprint of those making initial determinations, irrespective of final approval by the superior body or official.

The D.C. Board of Education already delegates or subdelegates much authority. The Board typically makes decisions about general policy, but general policies are so often framed in such abstract terms that the real policy decisions must be made by staff in applying the general policy. The school system could not function if the Board or the superintendent had to make the multitude of individual decisions required every day in a school system the size of the District of Columbia's. Of necessity, the Board already delegates or subdelegates most decisions, in number and probably in terms of importance. Staff, rather than the Board, decide, in fact, which applicants for teaching positions will be hired from the

9/ This, in fact, describes the relationship between the D.C. Council and Congress.

pool of eligible candidates. Persons other than Board members conduct hearings concerning pupil discipline and employee discipline and dismissal. Principals and teachers, rather than boards, assign children to particular classrooms and teachers. Teachers decide what materials children should use on a particular day and develop their own tests to measure comprehension.

The vast amount of delegation or subdelgation that now takes place in the school system has been legitimated by long practice and is seldom questioned. And, as will be further explored, some of the cases pertaining to these issues appear to rely more on customary practice rather than reason. Courts which have eschewed a reasoned approach to this area appear to presume the validity of customary delegation and subdelegation practices and to resist new forms of delegation and subdelegation. Those courts which have evidenced thoughtful consideration of the issues have been more open to patterns of delegation and subdelegation outside of customary practice.

This analysis will consider (a) whether the various judicial doctrines which address these issues have taken a reasoned approach and (b) the application of these doctrines to decentralization in the D.C. schools.

C. Decentralization in the D.C. Schools

1. History of Decentralization in the D.C. Schools

Decentralization of decision-making has been an issue of continuing

interest in the D.C. schools. The Board has experimented with both of the most common types of decentralization, i.e., it has in several instances increased the discretion of its employees at the regional and school levels and has authorized local boards made up of parents and other citizens to exercise discretion concerning educational matters affecting their schools. Set forth below is a description of those experiments.

In 1964 the Board authorized a "model school system" in the Cardozo High School area. Later identified as the Model School Division, this demonstration involving elementary and junior and senior high schools promoted innovations in educational programs and showed the "beginnings of a decentralized operation with maximum responsibility at the building level."[10/]

In 1967 the Board of Education and Antioch College agreed that Antioch would develop and control a demonstration community school project at the Morgan School. Subsequently the Morgan Community School Board took over the administration of the demonstration project and served as the governing board for the school.[11/] The Board obtained an

---

10/ A. H. Passow, Toward Creating a Model Urban School System: A Study of the Washington, D.C. Public Schools (Teachers College Columbia University 1967) at 132.

11/ P. Lauter, "The Short, Happy Life of the Adams-Morgan Community School Project" 38 Harvard Educational Review 2 (1968). See also, K. Haskins, "A Black Perspective on Community Control" 15 Inequality in Education 23 (1973).

opinion concerning its proposed delegation to local boards, dated January 13, 1969, from the D.C. Corporation Counsel. This opinion, which did not consider modern developments in the law of delegation and subdelegation in the federal courts,[12] took the position that "public officials or bodies may not, without statutory authorization, delegate their governmental powers." The opinion, however, also indicated that nothing prevented the Board "from seeking and acting upon the opinions, advice, views, and recommendations" of citizen groups of an advisory nature, so long as the Board of Education exercises the governmental functions related to the operation of the school system.[13] Consequently, in its agreement with the Morgan Community School Board, the Board appears to have attempted to respond to this opinion that it could act on the recommendations of citizens groups so long as it retained "ultimate authority over educational matters and does not 'delegate' ... governmental powers." How far the Board could go without delegating or alienating ultimate authority was not made clear.

The current contractual agreement between the Board of Education and the Morgan Board sets forth the scope of the authority which the Morgan Board could exercise.[14] The agreement with the Morgan Board

12/ See pp. 62-63, and 69 et. seq. infra.

13/ Opinion dated January 13, 1969 of D.C. Corporation Counsel, p.6.

14/ The Board of Education approved this agreement for a five year period on October 18, 1972. With some modifications, the current agreement is essentially a renewal of the earlier agreement.

recites that:

> The Corporation Counsel's decision concerning maximum feasible autonomy for the Morgan Community School restricts the Morgan Community School Board from directly submitting a budget to the Congress, negotiating contracts binding upon the D.C. Government, creating its own Board of Examiners, and operating contrary to established written policies and rules created by the Board of Education, including this policy agreement and any subsequent supplemental policy agreements which may be entered into in the future. 15/

Although required to operate within Board of Education written rules and policies, the Morgan Board was made responsible for preparing budget requests to the Board, for curriculum formation and instruction, for determining expenditure priorities and the number and kind of personnel to be hired within its fund allotment. The Morgan Board was authorized to establish additional staff criteria consistent with legal requirements to meet its special objectives. This personnel authority was qualified by stating the Morgan Board "will recommend its staff to the Department of Personnel", apparently to preserve formal central administration - Board of Education control over hiring.[16/]

The Morgan Board was also permitted to purchase, within its fund allocation, supplies and equipment not offered through the Board's regular channels, to enter into supplemental agreements with the

---

15/ Amendment to proposed policy agreement for the administration of the Morgan Community School set out in letter of September 20, 1972 from the Board of Education Committee on Student Life and Community Involvement to the full Board, p. 3.

16/ See p. 37 infra.

Washington Teachers' Union and to receive and administer educational funds from federal and private sources so long as complete financial accountability was established (the Morgan Community School Board is incorporated as a non-profit corporation).

In 1969, the Superintendent recommended to the Board that another local board, the Adams Community School Board, be involved in the operation of the Adams School. The Board of Education approved this recommendation. The Board's current agreement with the Adams Board, also entered into on October 18, 1972, is essentially similar to the Morgan agreement.[17/] Both agreements are for 5 years, expiring in October 1977.

17/ Our examination of decentralization involving the Adams and Morgan Boards has not included an examination of to what extent the discretion conferred in these agreements is actually exercised by those boards. Central Board rules are virtually silent on local board authority. Conversations with school district personnel have indicated that local board agreements do not adequately reflect the present relationship between the Board and local boards.

During the period from 1967 to 1972 other decentralization activities also took place. In 1967, the massive Passow Report,[18] which contained recommendations about decentralization in the public school system, was presented to the Board of Education.

A year later, at the request of President Johnson, the Board of Education, with special Congressional funding and heavy U.S. Office of Education involvement, established the Anacostia Community School District as a partially autonomous demonstration project in urban education.[19]

In 1971, the Spingarn Instructional Unit was established to meet instructional needs of, but not to exercise administrative control over, a geographic cluster of schools.[20]

Interest in decentralization has continued. In 1973 the Citizens Working Group for Decentralization submitted a system wide decentralization plan to the Board.[21] The next year the Superintendent announced the

---

18/ A.H. Passow, Toward Creating a Model Urban School System: A Study of the Washington. D.C. Public Schools (Teachers College Columbia University 1967).

19/ G. LaNoue and B. Smith, The Politics of School Decentralization, Lexington Books, (1973) at 102-108. In November 1973 the Board of Education approved a five year agreement authorizing the Anacostia Community School Board to continue operating the 22 elementary schools, 3 junior high schools and 1 senior high school within the division.

20/ See B. Sizemore, The Superintendent's 120 Day Report District of Columbia Public Schools (March 1974)at 22. In 1969, a "Five Year Plan" was submitted to and approved by the Board of Education. Basically the plan called for the establishment of eleven instructional units over a period of five years." Spingarn was the only one to become operational and, in 1974, served 17 elementary schools, 4 junior high schools, 2 senior high schools and 1 vocational high school. Id.

21/ The Citizens' Decentralization Proposal, Citizens Working Group for Decentralization, February 1973.

broad outline of a four phase plan for system wide decentralization.[22] The Board approved the first phase on June 5, 1974 by authorizing the establishment of six regions and positions for interim Regional Superintendents.[23] Regional Superintendents have been appointed and the six regional offices are now functioning.

As a national issue school district decentralization has come to have at least three different meanings. Some view it primarily as decentralization of administrative functions to regional or subdistrict administrators, others as conferring greater authority on school principals to make choices in budgeting, personnel, and educational program. Another meaning is to give parents, and sometimes the wider community, some degree of control over decisions about budget, personnel, and curriculum.[24]

22/ B. Sizemore, The Superintendent's 120 Day Report District of Columbia Public Schools (March 1974). The four phases presented in the plan are: Phase I: Six Regions established; Phase II: Twelve Regions established; Phase III: Delegation of administrative authority to decentralized regions; Phase IV: Delegation of policy-making authority to decentralized regions. Id. at 22. At the time the Superintendent's 120 Day Report was submitted to the Board 34.9% of the public school students in the District of Columbia were already participants in some form of decentralization. *

Model School Division	20,499 *	[Other] Elementary	41,304
Anacostia	26,172 *	[Other] Secondary	42,712
Community Schools	970 *	Career Development	2,823
		Special Education	2,020

23/ The Board of Education has since determined that only six regions will be established.

24/ See, e.g., Haskins, "A Black Perspective on Community Control", 15 Inequality in Education 23, (Nov. 1973), A. Thomas and R.W. Burgin, Community School Council: Philosophy and Framework for Urban Educational Change (Institute for Research and Development in Urban Areas, Central State Univ. 1970).

As described above, all three types of decentralization have occurred in the District of Columbia. The following analysis also covers the range of decentralization meanings; it considers decentralization both to local boards and to staff at the regional and school levels.

2. Accomplishing Decentralization Under the Present Legal Structure

Due to the historical and continuing interest in school decentralization in the District of Columbia, various opinions on the decentralization/delegation issue have been disseminated in recent years by the D.C. Corporation Counsel's Office and others.

For example, the Superintendent's Committee on Decentralization has suggested the following "rationale" for decentralization: "Maximum authority, responsibility, and accountability for the total educational program, including curricula, personnel, and budget, are delegated to sub-units of the school system."[25/] The Committee recommended that a modified form of "decentralization" -- regionalization (administrative decentralization) -- was appropriate for the public school system because,

---

25/ Decentralization Report Phase II at 3 (May 28, 1976).

> The Committee believes that the concept of decentralization -- the right of participation in decisionmaking and maximum authority, responsibility, governance, and accountability -- is not now possible. It is the opinion of the Committee that the Board of Education may not, without statutory authorization, lawfully delegate its duties and powers to any community group or body of citizens. 26/

Nevertheless, our analysis suggests that the Committee's opinion, as well as other opinions which have rejected the Board's power to delegate or subdelegate to local boards absent express statutory authority,[27/] should be reconsidered in light of modern developments in the law of delegation and subdelegation. Further details in this regard are provided in the following discussion, which examines the Board's power to delegate or subdelegate within the confines of its present legal mandate.

26/ Id. at 19.

27/ See, e.g., Opinion of the D.C. Corporation Counsel (January 13, 1969), p. 11 supra and Opinion of the General Counsel to the D.C. Board of Education (February 10, 1975)

PART ONE: THE LEGAL PRINCIPLES APPLICABLE TO THE DELEGATION OR SUBDELEGATION INVOLVED IN DECENTRALIZATION

A. The Intent of Congress Concerning Delegation and Subdelegation

1. Congressional Intent Evidenced in the Self-Government Act.

The Self-Government Act is silent concerning delegation or subdelegation by the Board. Congress does not appear to have considered the matter.[28]

In those parts of the Act receiving greater Congressional attention, concerning the powers of the Mayor and Council, delegation is specifically treated. The Mayor is authorized to delegate his authority in broad terms.[29] The Council is authorized to create and abolish agencies and other instrumentalities and to define their powers, duties and responsibilities.[30] Should a negative inference be drawn therefrom concerning the Board's power to delegate or subdelegate? We think not. The legislative history is clear that Congress never considered such issues with respect to the Board because the Subcommittee on Education did not

---

28/ The Subcommittee on Education of the House Committee on the District of Columbia held hearings on a bill which authorized the board to "establish such procedures as it deems necessary and appropriate to effectuate maximum citizen participation in policy decisions affecting the operation of the ... school system in the District of Columbia." HR 9470, §6; Hearings on HR 9470 held July 23 and 24, 1973, 93rd Congress, p. 2. However, at the time of the mark-up hearings of full House Committee, the Subcommittee had not completed its deliberations. The present language of the Self-Government Act was a stop-gap measure to fill the gap left by the lack of a detailed proposal from the Subcommittee on Education. For further discussion of the legislative history see note 54 and accompanying text, infra.

29/ §422(6), Code §1-162(6) (Supp. III 1976).

30/ §404(b), Code §1-144(b) (Supp. III 1976).

finish its work.[31]

Moreover, it can equally be argued from Congress' specific inclusion of authorization to delegate and subdelegate in those sections of the Act receiving its close attention, that Congress generally favors such authority. This is reinforced with respect to local citizen participation by a requirement that the Council establish Advisory Neighborhood Commissions (ANCs) when five percent of the voters in a neighborhood petition for the creation of an ANC. The ANCs are designated advisory; but they also "shall have such other powers and duties as may be provided by act of the Council."[32] Presumably, such neighborhood commissions could be granted decision-making functions.

Under the broad legislative powers which Congress conferred on the Council, it would appear that no specific authorization was required to permit the Council to establish ANCs. Congress, however, was sufficiently interested in citizen participation at the neighborhood level that it required the Council to establish neighborhood commissions where neighborhood interest is shown.

On balance, the Act and legislative history indicate a general intent to permit delegation and subdelegation and to promote local citizen involvement with respect to governmental decisions affecting their neighborhoods.

31/ Furthermore this authority of the Mayor and Council do not detract from the Board's. The Mayor can only delegate his own authority, and the Council's power to create and abolish agencies is directly limited by the grant of control over the D.C. schools to the Board.

32/ Self-Government Act, §738(c)(3).

Several other actions by Congress in years prior to the Self-Government Act also appear relevant to the issue of Congressional intent. The 1968 statute making the Board an elected body declares that it is "the purpose of this Act to give the citizens of the nation's capital a direct voice in the development and conduct of the public educational system of the District of Columbia; ... and to make District schools centers of neighborhood and community life."[33/] The first clause above could be read merely as support for an elected Board. The second appears to go further and offer encouragement for greater neighborhood and community involvement. Another possible indication of Congressional intent on these issues may be gleaned from the fact that Congress provided specific funding for the Anacostia Community School Project, a decentralized project using policy-making community boards.[34/] Both of these actions indicate a general Congressional approval of decentralization and community involvement in education but do not answer the question of what functions may be delegated or subdelegated and according to what standards.

The major concern of this analysis is the extent to which the Board, under its present authority to control the schools, could vest authority in its employees or local boards in order to decentralize decision-making.

33/ District of Columbia Elected Board of Education Act, Pub. L. No. 90-292, 82 Stat. 101 (Apr. 22, 1968).

34/ See p. 15 supra.

The Self-Government Act is silent with respect to these questions. Overall, the Act indicates that Congress generally approved of delegation and subdelegation and favored local neighborhood involvement. Previous acts of Congress pertaining to the Board are somewhat supportive. However, it may be argued that Congressional intent with respect to the Board is ambiguous; consequently we must consider (a) the Board's authority under the Self-Government Act and (b) the case law regarding delegation and subdelegation by public bodies having similar authority.

2. Congressional Intent Concerning the General Authority of the Board Under the Self-Government Act

a. Introduction

The Board derives its powers from the Congress of the United States. The basic document which sets out the powers of the Board is the District of Columbia Self-Government and Governmental Reorganization Act.[35/] If this Act had explicitly stated that Congress intended the Board of Education to have the discretion to freely transfer its powers to subordinate employees or boards, we would have to look no further for the Board's authority to delegate or subdelegate. The Self-Government Act, however, is silent on questions of delegation and subdelegation related to the Board. It vests "control" of

---

35/ Public Law 93-198, 87 Stat. 774 (1973). Title IV of the Act, the "charter" for the District of Columbia government, was approved by Congress and the voters of the District by referendum. Effective January 1, 1975, it granted to the District of Columbia government limited home rule powers.

the public schools in the District of Columbia in an elected Board of Education and restricts the power of the Mayor and the Council over the Board.[36]

Our first task will be to ascertain the general powers of the D.C. Board under the Self-Government Act's grant of "control" over education. To what extent did Congress intend that the Board, within the scope of its grant of authority over the D.C. public schools, exercise "legislative" power either exclusively or concurrently with the Council? Conversely, to what extent did Congress intend that the Board function purely as an administrative agency under the control of the District of Columbia Council? If its powers are purely administrative, does this mean that the Board is more closely circumscribed in the exercise of discretion over education to the extent that it may not subdelegate authority to local boards?

Our analysis of the present legal structure indicates that the Board has the authority to exercise limited legislative powers over public school policy. In the exercise of such powers it may have greater authority to delegate quasi-legislative and quasi-judicial functions to subordinate boards or officials to implement general legislative policies than if it were seen purely as an administrative agency.

However, there has been no authoritative interpretation of the

---

36/ Self-Government Act, §§495, 452, 602 and 719 discussed at pp. 29-35 infra.

Board's powers since enactment of the Self-Government Act and the power has not been judicially confirmed. Thus, while we will discuss the Board's concurrent legislative power as a basis for decentralization, we will also consider the authority the D.C. Board would have to subdelegate if characterized purely as an administrative agency.[37] If the Board is so characterized, it is unclear what kind of administrative agency it is. The Self-Government Act and an earlier D.C. case refer to the Board as "an independent agency" of the District of Columbia government.[38] But there is no direct precedent concerning the powers of an independent agency in the District. Moreover, the Board has certain of the characteristics of a federally created agency, a school district, a municipal corporation[39] and a state agency. Consequently, after considering the

---

37/ Prior to the enactment of the Self-Government Act, a law review article had suggested ways in which the D.C. Board could subdelegate responsibilities to local boards. Note School Decentralization: Legal Paths to Local Control, 57 Geo. L.J. 992 (1969). This article predated the Self-Government Act and did not consider the Board's authority to delegate under its legislative powers. The Self-Government Act has changed the legal relationships between the D.C. Board, City Council and Congress, necessitating a substantial reanalysis.

38/ Self-Government Act, Title IV Part F §495 and District of Columbia v. Marsh 47 App. D.C. 59 (1917). The most comprehensive law review of the Self-Government Act indicated that "many [congressional] members had differing views on the nature of the new district government." Newman, J.I. and DePuy, J.B., Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 Am. U.L. Rev. 537, 556 (1975) (hereinafter Newman and DePuy). There is legislative history to support the view that the District is a municipal corporation (S. Rep. No. 219, 93rd Congress 1st Session, (4) (1973)), similar to a state (HR Rep. No. 492, 93rd Congress, 1st Sess., (120-21) (1973)), or "a unique entity with the powers and characteristics of a city in a state, possibly a city, state or perhaps something even more novel." (Id.)

39/ One early case referred to the Board as standing in the "attitude of a municipal corporation." Coleman v. District of Columbia, 51 App. D.C. 352, 354 (1922).

authority of the Board we will explore the principles of delegation or subdelegation applicable to such entities.

b. Overview of the Powers of the Board

1. In General: The Present Legal Structure

As described above, the precise nature of the Board under the present legal structure eludes characterization. It is at once similar to a federal agency, a school district, a municipal corporation, and a state agency. However, certain aspects of the Board's powers may be elicited from its general statutory grant of authority, and may aid in the interpretation of the Board's authority to delegate or subdelegate for school decentralization purposes.

Under the Self-Government Act the "control of the public schools in the District of Columbia is vested in a Board of Education...."[40/] The Act also designates the Board as an "independent agency."[41/] This designation denotes a degree of independence from the Mayor and City Council, and is bolstered by the specification that its members be

---

40/ Self-Government Act §495. This language is identical to that in the Code, §31-101(a) (Supp. III 1976). Another provision of the Self-Government Act §719 specifies that "the term of any member elected to the District of Columbia Board of Education, and the powers and duties of the Board of Education shall not be affected by the provisions of section 495."

41/ Self-Government Act Title IV Part F.

elected.[42] However, the precise degree of independence which an "independent agency" is to have under the Self-Government Act is unspecified and remains unclear.

Congress' purpose in enacting the Self-Government Act was to delegate limited home rule powers including "certain legislative powers to the government of the District of Columbia" to "relieve Congress of the burden of legislating upon essentially local District matters.[43] The Act delegates broad legislative powers,[44] subject to Congressional

---

42/ "Independent agency" is not defined in the Self-Government Act. The District of Columbia Administrative Procedure Act defines it as an agency of the District of Columbia government "with respect to which the... (Mayor) and the Council are not authorized by law, other than this chapter to establish administrative procedures...." D.C. Code, §1-1502(5) (1973). There are five independent agencies established by the Self-Government Act: the Board of Elections (§491), the Zoning Commission (§492), the Public Service Commission (§493), the Armory Board (§494) and the Board of Education (§495). The Board of Education is the only independent agency whose governing board is elected with no participation by the Mayor and Council in the selection process. For all independent agencies except the Board of Education, a majority of their governing boards or commissions are appointed by the Mayor with the advice and consent of the Council. Self-Government Act, §§491-494.

43/ Self-Government Act, §102(a). See generally Newman & DePuy, supra note 38.

44/ §302, the basic Congressional grant of legislative authority, provides, "Except as provided in Secs. 601, 602, 603, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution and the provisions of this Act subject to..." Article I, §10 of the Constitution.

restrictions,[45] to an elected Council[46] and vests the executive power of the District in an elected Mayor.[47] The Act also defines the basic governmental structure of the District of Columbia in Title IV, the District Charter, which can, with express exceptions,[48] be amended only by an act of Congress or by a Council initiated act and referendum which is subsequently adopted by concurrent congressional resolution.[49]

Prior to the Self-Government Act, only Congress could enact provisions of the Code. The Act now gives the Council the power to enact and revise Code provisions subject to certain Self-Government Act

---

45/ Under Section 601, Congress retains ultimate constitutional authority to legislate for the District. Section 602 prohibits the Council from legislating in a manner inconsistent with the D.C. Self-Government Act and in nine enumerated areas (none of which are directly relevant to this analysis. Section 603 limits the District's power regarding borrowing, spending and the budgetary process. The limitations on the District's budgetary process provide that "(a)Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General... in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia."

46/ Self-Government Act, §404, Code §1-144 (Supp. III 1976).

47/ Self-Government Act, §422, Code §1-162 (Supp. III 1976).

48/ Self-Government Act, §303 and Code §1-125 (Supp. III 1976). The Council may not amend the sections of the Charter concerning the establishment of the elected Council or elected Mayor or the judiciary of the District of Columbia.

49/ Id. §§303(a) and (b), Code §1-125(a) and (b) (Supp. III 1976).

limitations.[50] One express limitation on the Council's power is the delegation by Congress of "control" over the public schools to an elected Board of Education. An additional limitation is that the Mayor and Council cannot "specify the purposes for which [Board] funds may be expended or the amount of such funds which may be expended for the various programs under the jurisdiction of the board...,"[51] although the Mayor and Council may increase or decrease the total amount of the Board's budget.

The term "control" is not defined in the Self-Government Act even though its meaning is central to the respective powers of the Board, Council and Mayor. In addition, the Act is silent on the extent to which the above prohibition on Mayor and Council authority over Board expenditures absolutely bars the Mayor and Council from determining educational policies or the organization and structure of the schools.

c. Reconciling the Powers of the Board and the Council

(1) Introduction

How do the Board's powers mesh with those of the Council under the Self-Government Act? To what extent is the Board authorized to act autonomously? And to what extent is this a limitation on the

---

50/ See note 36 supra.

51/ Self-Government Act §452, Code, §31-104-1 (Supp. III (1976)).

Council's legislative powers? These are important questions since they relate to whether the Board, the Council, Congress, or a combination of these bodies have the power to accomplish decentralization. We will first look to the legislative history of the Self-Government Act for the intent of Congress concerning the scope of Board control. We will then consider the "control" exercised by the Board which is reflected in the provisions of the D.C. Code and Board Rules. Based on the above factors we will examine three possible interpretations of Board "control."

(2) Legislative History of the Self-Government Act

The provisions of the Self-Government Act pertaining to the Board of Education do not reflect a carefully developed comprehensive framework for public education in the District of Columbia. Instead, Congress enacted the present provisions governing the Board as a temporary measure to preserve the "status quo" while Congress further considered the structure and governance of public education.

During early House deliberations over the Self-Government Act, responsibility for legislation pertaining to education in D.C. was delegated to the House Subcommittee on Education of the Committee on the District of Columbia chaired by Representative Dellums.[52/] At the time the full

---

52/ This delegation is reflected in Section 394 of House Subcommittee on Government Operations Study Draft No. 2, June 1, 1973. Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills, 93rd Cong. 2d Sess. (committee print) at 365 (hereinafter Legislative History).

House Committee considered the proposed Self-Government Act, the Education Subcommittee was not ready to recommend a detailed education provision. Consequently, at the urging of the Chairman of the Education Committee, Representative Ronald Dellums, the full committee adopted the present language in the Self-Government Act, not as a final resolution of Board-Council issues, but to preserve the integrity of the Board until the subcommittee's proposals were ready:

> [W]e are trying at this moment, to maintain the integrity of the School Board until we can hold adequate hearings and an adequate mark-up to come up with a carefully thought out thorough competent piece of legislation in this very important area,... 53/

Thus the primary purpose of the Self-Government Act provision pertaining to the Board was to maintain the "status quo." 54/ The

---

53/ Legislative History at 1131.

54/ The legislative history contains frequent references to the maintenance of the "status quo." For example, in referring to section 495, which vests control in the Board, Representative Dellums stated that Section 495 [at that time Section 495 also included certain language pertaining to the Board's budget that became section 452] "would not allow the Board of Education to be changed by anyone. It simply says leave it alone. Leave it as it is at this moment until such time that this body can enact a new piece of legislation clearly directed at the whole issue of the nature of the autonomy of the Board of Education." (Legislative History at 1131). Representative Dellums further indicated in referring to the substance of section 495, 452 and 719 that, "all my amendments are attempting to do is to protect the status quo of the school board, at this time, until such time as our subcommittee can work its will, ..." [Id. at 1132] He subsequently stated that his intent was to "put some language in the bill that protects the integrity of the elected school board as an independent body in the community, and to continue that status quo until such time as we are able to move" [Id.]. The Report of the House Committee on the District of Columbia (H.R. Rep. No. 93-482) stated that present section 495 "maintains the status quo with respect to the 11 member elected Board of Education" [Id. at 1475]. These statements of intent from the House committee should be given substantial weight since the Senate bill (S. 1435) had no provisions concerning Board "control" or structure (except an equivalent of section 452). In conference, the Senate conferees acceded to sections 495 and 719 which were proposed by the House and the House conferees acceded to the Senate provision governing the Board's budget, i.e., the language that became §452.

implications of the Self-Government Act's preservation of the "status quo" with respect to the elected Board's relationship to the Council created by the Act are ambiguous. For example, it is unclear from the general statements in the legislative history about maintaining the "status quo" whether only the structure of the Board or both the structure and powers of the Board are protected from Council encroachment.

Section 719 sheds additional light on the meaning of "control" in section 495, which, as indicated above, was intended to preserve the "status quo" with respect to the Board. Section 719 provides:

> The term of any member elected to the District of Columbia Board of Education and the powers and duties of the Board of Education shall not be affected by the provisions of section 495. No provision of such section shall be construed to extend the term of any such member or to terminate the term of any such member (emphasis added).

The reference in section 719 to Board "powers and duties" appears to indicate that section 495 was not intended to affect the Board's pre-existing authority over education.[55/] Furthermore, the "control" language of section 495 included no new terms or concepts. There was explicit recognition that section 495 "simply restates the language of the 1968 bill that brought the elected school board into existence, and protects the

---

55/ In fact, the House Committee Report (H.R. Rep. No. 93-482) is even more expansive, stating that by section 719 "the powers and duties of the Board of Education are not effected [sic] by the Act" (Id. at 1480) (emphasis added).

integrity of that language."[56] Congress further clarified the meaning of "control" and the extent of Board autonomy from the Mayor and Council in section 452 which provides:

> With respect to the annual budget for the Board of Education in the District of Columbia, the Mayor and the Council may establish the maximum amount of funds which will be allocated to the Board, but may not specify the purposes for which such funds may be expended or the amount of such funds which may be expended for various programs under the jurisdiction of the Board of Education.

Representative Dellums, Chairman of the Education Subcommittee, saw this provision as a substantial limitation on the power of the Mayor and Council. He viewed the Mayor and Council's powers over the Board's budget as terminated when the "maximum amount" is established, and saw the Mayor and Council as barred from a line item item review in establishing this maximum.[57] After the maximum is established the Board then "maintains line item control of the budget."[58] In the words of Representative Dellums;

> There is no way that the City Council can go and say you must chop off special education or you must chop off early childhood education. It [the maximum amount] is a negotiated figure. Once that is achieved they [the Board] maintain the integrity of the budget. [59]

56/ Statement of Representative Dellums, Chairman of the Subcommittee on Education of the House District Committee (Id. 1130)

57/ Id. at 1143.

58/ Id.

59/ Id.

A similar intent with respect to limitations on the power of the Mayor and Council over the Board's budget was also reflected in the Senate Committee Report (S. Rep. No. 93-219) which stated,

> It is the committee's view that since the Board of Education is a separately elected body it should be responsible to the electorate for the manner in which education funds are expended. 60/

It is also unclear to what extent the phrase "jurisdiction of the Board of Education" in section 452 was intended to connote exclusive control over school affairs vis a vis the Council. Representative Diggs used the term in a way that indicated it was intended to have independent significance. In referring to H.R. 9682 in the House District Committee's mark-up session he stated,

> it [the bill] reserves the composition and jurisdiction of the Board of Education as presently constituted, until such time as Congress acts. 61/

60/ Id. at 2728.

61/ Id. at 1358. Representative Diggs further confused the issue by stating immediately thereafter:

> If Congress does not act by the 2nd of January 1975, then the power with respect to changes would be shared by the City Council.

However, since the provisions pertaining to the Board to which he is referring were not to take effect until January 2, 1975, upon successful passage of a referendum, this comment by Representative Diggs may have been referring to the charter amending process. Otherwise his remarks concerning time make no sense, because H.R. 9682 did not significantly affect the powers of the then existing Board and Council until, at the earliest, January 2, 1975. Thereafter the charter could be amended by referendum and Congressional approval, (albeit the amending process could be initiated by the Council).

It may also be significant that while proponents of the provisions pertaining to the Board in the Self-Government Act claimed that these provisions simply preserved the "status quo", opponents of these provisions, including Representative Ancher Nelsen viewed them as conferring "near autonomy" on the Board.[62/]

Taken alone, Congress' intent to preserve the "status quo" with respect to the Board of Education is subject to at least two interpretations. The first interpretation is that Congress intended merely to preserve intact the structure of the Board and the Board's general relationship to the Congress; and further, when Congress delegated certain legislative powers to the Council, it delegated some of its prior authority over the Board to the Council, e.g., the concurrent power to amend the D.C. Code.

The second interpretation is that Congress intended to preserve the previous relationship of the elected Board and appointed Council in "status quo", i.e., the Council was not to exercise legislative authority over the D.C. public schools in a manner which disturbs the "status quo" because Congress intended to legislate in this area.

2/ Id. at 2129. Representative Nelsen was considered an authority on D.C. government because he had been the chairman of the Congressionally created Commission on the Organization of the Government of the District of Columbia which published a lengthy report commonly referred to as the "Nelsen Report" (Report of the Commission on the Organization of the Government of the District of Columbia, House Doc. No. 92-317, 92d Cong. 2d Sess. (1972).

However, the ambiguous intent concerning preservation of the "status quo" in the legislative history does not stand alone. Sections 452 and 719 further clarify Congressional intent and reinforce the second interpretation.[63/]

The second interpretation also appears to reconcile the views of the proponents of the Act's education provisions, who saw these provisions as preserving the "status quo", and their opponents who saw these as carving out greater autonomy for the Board. If the "status quo" between the Board and Council were to be preserved, the Board would have to be given greater autonomy to insulate it from the legislative power delegated by Congress to the Council in the Self-Government Act. To explore the consequences of this second interpretation we will consider the relationship among Congress, the Board, and appointed Council and Commissioner prior to the Self-Government Act.

3. The Pre-Self-Government Act Relationships Among Congress, the Appointed Council and the Elected Board

The term "control" referring to the Board's power over education, is not new to the Self-Government Act. The legislative history of that Act indicates that the language pertaining to "control of the public schools" is a restatement of language from the District of Columbia Elected Board of Education Act of 1968.[64/] This term was also used in the Organic Act

---

63/ Given this interpretation, the language of Sec. 602(a) (limitations on the Council) takes on additional significance, i.e., "The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, ..." (emphasis added)

64/ P.L. 90-292 (April 22, 1968), Code, §31-101(a) (1973). See note 56 supra.

of 1906 which established a nine member board of education.

> The control of the public schools of the District of Columbia is hereby vested in a board of education...65/

> The board shall determine all questions of general policy relating to the schools, shall appoint the executive officers hereinafter provided for, define their duties and direct expenditures.66/

The authority which the Board exercised under these previous acts is reviewed below because Congress in the Self-Government Act appears in large part to have intended to maintain the "status quo" with respect to Board "control."67/ After reviewing the extent of Board "control" prior to the Self-Government Act, we will review the question of how to interpret the relationships among Congress, the Board and Council intended by the Self-Government Act.

Prior to the enactment of the Self-Government Act, Board "control" as used in the Code did not legally or in practice mean or result in complete Board autonomy from Congressional regulation. By the time the Self-Government Act went into effect a mixed picture had resulted. In certain areas Congress had regulated Board action in great detail. In other areas the Board was issuing regulations that in most states were the subject of state legislation. The picture is further

---

65/ §2 of the Organic Act of 1906, Code §31-101 (1973).

66/ §2 of the Organic Act of 1906, Code §31-103 (1973).

67/ See note 54 supra.

complicated by the fact that Congress conferred certain functions, largely related to school buildings, contracting, purchasing and disbursing funds on other agencies of the District of Columbia government.

The Board was authorized by Congress to appoint, promote, transfer and dismiss school personnel upon the written recommendation of the superintendent.[68] However, Congress in the Code imposed certain requirements concerning salary classifications, benefits, and who could be appointed.[69] The Code defined the duties of the superintendent[70] and principals[71] in general terms. Heads of departments and head teachers also had duties specified.[72]

The Board was directed to provide free textbooks and other necessary books and supplies,[73] but could only purchase books and

---

68/ Code §31-102 (1973).

69/ Teachers were required to pass an examination prescribed by a board of examiners (Code §31-114 (1973)), and certain qualifications for appointment were specified (§31-1511 (Supp. III 1976)). The salary schedule (§§31-1501 Supp. III 1976)), the general requests for classification and assignment of employees (§§31-1511 (Supp. III 1976)) and (§31-1512 (1973)), the method of assigning employees to salary schedules (§31-1521 and 31-1522 (1973)), and the method of advancement and promotion (§31-1531-1536 (1973)) were prescribed. The Code mandated that salaries be paid semi-monthly (§31-1543) provided for sick and emergency leave for teachers (§31-691), a retirement system (§§31-701-31-746), and for renewal of teaching certificates (§31-1513 (Supp. III 1976)).

70/ Code §§31-105 (1973). The superintendent is to direct and supervise "all matters pertaining to the instruction in all the schools under the Board of Education."

71/ Code §31-115 (1973). This section was repealed by the Ethnic Reference Repeal Act. D.C. Law No. 1-26 (1975).

72/ Code §31-113 (1973).

73/ Code §31-401 (1973).

supplies that had been recommended by the superintendent and approved by the Board.[74]

The Code reflects that Congress exercised relatively little control over educational policy and that its intervention in this area was far from systematic. Instead, it appears that the Congress and the Board exercised "concurrent" authority over the specifics of education in the District of Columbia, and that Congress took educational action of a specific nature only in random areas where it believed that the Board had failed to exercise its initiative or where it wished to circumscribe the Board's initiative.[75]

Congress also conferred certain functions pertaining to the D.C. schools on other agencies of the District Government. For example, the District Government was given the power to acquire and hold real estate for school purposes,[76] purchase sites for school construction,[77] prepare architectural plans for school construction[78] and construct school buildings.[79] The District Commissioners were authorized to make rules

---

74/ Code §31-404 (1973).

75/ For example, the Code set a minimum number of students in classes §31-113 (1973)). It authorized a high school course in aeronautics (§31-1201 (1973)) and the appointment of an instructor in automobile training (§31-624 (1973)). It also classified academic and scientific subjects in certain high schools (§31-112 (1973)).

76/ Code §1-105 (1973).

77/ Code §1-812 (1973).

78/ Code §9-219 (1973).

79/ Code §9-220(a) (1973).

and regulations with respect to the retirement of public school teachers;[80] and to approve action classifying employee positions according to statutory criteria[81] and Board regulations concerning tuition of non-resident students.[82]

The Board was not fiscally independent from the District Government; it had no power to tax or to raise money through bond issues. Its appropriation authority came from Congress to and through the District Government. The Board annually transmitted to the D.C. Commissioner a detailed estimate of the funds required for the public schools[83] and the Commissioner was directed to transmit the Board's estimate to Congress and the President in his annual estimate of appropriations for the District of Columbia, "with such recommendation as he may deem proper."[84]

80/ Code §§31-717, 31-721, 31-736 (1973).

81/ Code §31-1522(b) (1973).

82/ Code §31-308(a) (1973).

83/ Code §31-104 (1973)

84/ It is clear that the Commissioner was intended to be a conduit for transmitting the Board's estimate to Congress, but that Congress wanted the Commissioner's recommendations based on the Commissioner's oversight of the total budget and revenues for the District as a whole. Nevertheless in practice, the Commissioner and the appointed Council made line item changes in the Board's budget before submitting it to the President and Congress. The lack of independent legal counsel (the Council, Commissioner and the Board were all represented by the Corporation Counsel) made it difficult for the Board to challenge incursions by the Commissioner or Council on its powers.

Once funds were appropriated and allocated for public schools, the Board had the power to "direct expenditures."[85] Expenditures were to be made and accounted for "...under the direction and control of the Commissioner of the District of Columbia."[86] The District of Columbia government also retained statutory authority for contracting,[87] purchasing,[88] and disbursing.[89] Since the Board had the power to "direct expenditures" Congress appears to have intended the District Government's role in these matters to be ministerial, e.g., insuring compliance with uniform procedures, writing checks, ordering supplies and accounting.[90]

Thus, at the time the Self-Government Act took effect, the Board did not have unfettered discretion over every aspect of public education. Its authority was subject to Congressional direction in certain areas and was further limited by Congress' vesting some functions related to the

---

85/ Code §31-103 (1973).

86/ Id.

87/ Code §1-245 (1973)

88/ Code §1-304 (1973).

89/ Code §47-112, 47-112(a) (1973). See also Code §31-103 (1973).

90/ Cf. note 84 supra.

public schools in other parts of the D.C. Government.[91]

Although the above list of Code requirements may appear extensive, an examination of Chapter 31 of the Code shows that Congress left the Board free to regulate most matters of educational policy without providing any standards or restrictions. Furthermore, Board rules govern a number of areas which in most states are regulated by state legislatures.

The licensing of teachers is generally a state function with the requirements for a license specified by state legislature.[92] In the District, the Board of Education not only licenses teachers by subject and level but also determines the license requirements, absent any Congressional standards.[93]

In virtually every state the legislature requires a certain number of days of instructions which school districts must provide.[94] However,

---

91/ The District of Columbia Elected Board of Education Act of 1968, which provided for an elected rather than an appointed Board of Education, and increased the Board from nine to eleven members, made no change in the legal structure just described (P.L. 90-292 (April 22, 1968)). The only other substantive requirement of the 1968 Act was §5 entitled "Coordination With the District of Columbia Government", which required the Board and the Commissioner "jointly develop procedures to assure the maximum coordination of educational and other municipal programs and services..." Code §31-104(b) (1973). Congress appears to have regarded the Board as so independent from the District Government that Congress had to direct coordination between the Board the the District Government.

92/ "Teacher Certification", A Study of State Legal Standards for the Provision of Public Education (Lawyers' Committee for Civil Rights Under Law 1974).

93/ Rules for the Public Schools of the District of Columbia, Chapter XVII. Congress authorized the Board to perform this function. Code, §§31-1511 (1973) and 31-1513 (Supp. III (1976)).

94/ "School Calendar", note 92 supra.

the Board, on its own, has established a school year of 180 days.[95] In most states graduation requirements are set by the state legislature or state department of education.[96] Congress, however, has left these up to the Board.

Detailed state statutes or regulations govern teacher dismissals in most states. In the District, matters such as cause for termination, notice, hearing, and appeals are determined by the Board, subject to constitutional requirements.

Without any statutory authorization other than the "control" language, the Board of Education has also adopted through its rule-making powers the equivalent of a labor relations code.[97] The labor relations rules specify the procedures that the Board will follow for recognition of employee organizations including the holding of representation elections. They also establish the scope of collective bargaining in which the Board will engage.

These rules specify that the Board, in the event of a negotiation impasse in collective bargaining, can agree to delegate its authority and discretion to binding arbitration.[98] Moreover, the Board, by rule and

---

95/ Rules, Chap. XII, Sec. 1, par. 2.

96/ "High School Graduation Requirements", supra note 92 at 38-39.

97/ Rules, Chap. XVIII.

98/ Id.

by contract with the teachers union, has completely delegated to an arbitrator, to be chosen by the American Arbitration Association, the power to make final decisions concerning teacher grievances concerning the interpretation or application of the specific terms of the contract.[98a/]

It thus appears that the Board has always been a hybrid entity whose exact nature has been difficult to capture. Because of its function it is obviously like a school board in a state system of education. However, the fact that it is not part of a state system, but under Congress, is a significant difference. The rules applicable to the powers of other school boards appear to have been fashioned, in part, as a consequence of their role as state agents for carrying out the state legislature's constitutional obligation to provide free public education.[99/] The nature of the delegated constitutional obligation which school districts perform for state legislatures helps to account for the strict approach which state courts frequently take toward school district powers with respect to delegation and subdelegation. No specific federal constitutional obligation defines the nature of the relationship between Congress and the Board.[100/]

98a/ Board agreement with the Washington Teachers Union, Local 6, American Federation of Teachers AFL-CIO, Art. VI, B.2.a. step 4.

99/ Forty-nine states have provisions requiring the provision of education in their state constitutions. State Constitutional Provisions and Selected Legal Materials Relating to Public School Finance (U.S. Department of Health, Education and Welfare 1973).

100/ The federal Constitution, Article I, Section 8 grants to Congress the power to legislate with respect to the District. This grant imposes no specific obligation concerning the provision of public education.

Indeed the primary focus of Congress has always been national issues. Since Congress' attention has largely been elsewhere, it would have made little sense for the Board to have been encumbered by a presumption that it could not act unless it had specific authorization to do so. And in fact, the Board was presumed to have authority to organize and regulate education in the District unless its action was prohibited by Congress[101] or unless Congress specifically directed the appointed Commissioners/Council to promulgate regulations pertaining to education (Congress did so only in narrowly defined areas).[102]

4. Three Interpretations of the Relationships Among Congress, the Board and the Council

As a backdrop for this discussion of the Board's relationship to the Council and Congress we have considered the Board's "control" over public education in the District conferred by Congress under statutes prior to the Self-Government Act. This section will discuss three interpretations of the relationships among Congress, the Board, and Council.

Under one interpretation the Congress' legislative power is supreme, but the Council, short of abolishing the Board outright, has virtually unlimited power to regulate Board powers and educational policy in the District. A likely corollary is that the Board must seek Council

---

101/ See p. 48 infra.

102/ See pp. 38-39 supra.

authorization to regulate educational policy or change the school system's organization -- insofar as specific authorization for proposed Board action is not found in the Code.[103/] Thus, under this interpretation, the Council is a legislative body with primary responsibility for the delegation of legislative power to administrative agencies. Any transfer of power by the Board as an administrative agency/delegatee would be construed as a subdelegation of authority.

However, we have concluded that such a restrictive view of the Board's power is inconsistent with the Self-Government Act and was not intended by Congress. This interpretation would radically change the "status quo" that existed before the Self-Government Act between the Board and Council/Commissioners. Congress vested "control" over the public schools in the Board. It not only designated the Board as an independent agency, but also as the only such agency with an elected governing Board. Furthermore, the Act is explicit that the Council may not specify how funds provided the school district will be used by the Board. The grant of power to the Board and limitation on Council power

---

103/ Self-Goverment Act §495. The central issue here is whether the Board must seek prior authorization from the Council or the Congress for actions not specifically prohibited by the Code, e.g., to delegate or subdelegate. Neither the authors of the American University Law Review article on the Self-Government Act (Newman & DePuy, supra note 38 at 585-87) nor the opinion of December 5, 1975 prepared for the Council on the respective roles of the Council and the Board by the law firm of Arnold & Porter, consider this issue. Both however, lean toward a theory of expansive Council legislative power over public education. Based on the legislative history discussed, supra, we believe Council power in this area is narrower than they imply. However, under the theory of concurrent Board and Council power discussed infra, precise resolution of this question is not necessary for consideration of delegation and subdelegation issues.

clearly indicate that the Board does not have to look to the Council for specific authorization to make policy concerning education in the District.

A second interpretation of the relationship between the Board and the Council is that Congress retained ultimate legislative authority and in the absence of additional Congressional action, intended the Board to exercise exclusive authority over all educational matters, including those which Congress had itself regulated or conferred on other District officers and agencies. Under this interpretation, Congress is viewed as delegating authority to the Board which, as a legislative body, may similarly delegate (rather than subdelegate) its legislative authority to others. We have concluded that this interpretation is also incompatible with the Self-Government Act, since the Board was given no power to amend or ignore the provisions of the Code governing education. One could argue Congress intended that if changes in Code provisions pertaining to education were to be made, Congress, rather than the Council, would make them, thereby preserving the Board's control vis-a-vis the Council. Congress, however, did not specifically prohibit the Council from amending Chapter 31 pertaining to education.[104/] Nor is education one of the specific limitations contained in §602 of the Self-Government Act. Moreover, one cannot find in the legislative history an intent to increase the Board's powers so radically.

A third interpretation appears to better accommodate the Council's

---

104/ But see pp. 29-35 supra.

legislative power to the Board's control over education. Under this view the Council and the Board have concurrent power of a legislative nature over education under their respective grants from the Congress.[105] Although Congress retains ultimate legislative authority, the Council has some legislative authority over education, subject to certain limitations expressed in or implied from the Self-Government Act.[106] The Board of Education also has concurrent legislative power over educational matters, under its authority to "control" the public schools and to determine the purposes for which its funds will be spent and the amount of funds to be spent for particular programs under its jurisdiction. However, the Board is also bound by the present provisions of the Code, as amended by the Council acting within the Council's proper limitations. Under this interpretation, the Board can determine educational policies and the manner in which the school system shall be organized and Board "control" exercised, unless Board action is specifically prohibited by a valid provision of the Code. Consequently, the Board has attributes of both a legislative body and an administrative agency.

105/ The phase "concurrent legislative power" is not meant to imply that Board and Council power overlaps in all areas. For example, even though they may be able to exercise concurrent power in certain matters, in others the Board or Council has exclusive jurisdiction, except as against Congressional authority. In addition, the term "concurrent power", as used to describe the relationship between the Board and Council, does not in an of itself indicate which body, in the case of a conflict between them would prevail.

106/ E.g., Self-Government Act, §§495, 452, 602(a), 719. See pp. 29-35 supra.

This interpretation is consistent with the Board's relationship to Congress prior to the Self-Government Act. One case decided after Congress enacted the 1906 Act governing the Board held that the Code provision which "in broad terms, places the general control of the schools within the Board" should be construed liberally "so as to give the Board as broad discretion as possible in carrying out its objects."[107] A subsequent case stated that:

> It may be said that the administrative power of the board of education extends, broadly speaking, to all matters affecting the welfare of the public schools, and where the question is not covered by statute it may be by reasonable regulation of the board.[108]

Although characterized as "administrative", the power described in these cases is more akin to legislative than purely administrative authority. Furthermore, Board rules and regulations have been "deemed to have the force and effect of law", unless they are in conflict with express statutory provisions.[109] No legislative standards confine the exercise of such authority - the court states that the Board could act without any guidance whatsoever from Congress. Furthermore, the Board need not look to a specific Congressional authorization in order to act; it could regulate "all matters affecting the public schools" unless

---

107/ U.S. ex rel. Nalle v. Hoover, 31 App. D.C. 311, 318, 320 (1908).

108/ District of Columbia v. Dean, 38 App. D.C. 182, 186 (1912).

109/ Id. U.S. ex rel. Cromwell v. Doyle, 69 App. D.C. 215, 99 F.2d 448 (1938), cert. den'd. 59 S. Ct. 488, rehearing den'd. 59 S. Ct. 641.

prohibited by statute. The Self-Government Act's delegation to the Board of control over the schools in the District is similarly unrestricted. Such open-ended authority to make policy is the essence of legislative power.[110]

The powers of the Board established prior to the enactment of the Self-Government Act undoubtedly have continued under the Act. Congress' major concern with respect to the Board was at least to maintain the Board's existing powers.[111] In fact, Congress gave the Board additional powers under the Act by prohibiting the Mayor and Council from specifying how the Board will use its funds.

The exercise of concurrent powers over education could conceivably give rise to conflicts between the Council and the Board. The Council might attempt to limit Board power by amendments to the Code. However, for the purposes of considering whether the Board has authority to delegate or subdelegate to accomplish decentralization, it is not necessary to explore the confines of the Council's power to amend Chapter 31 of the Code.[112] However, it should be noted that at some

---

110/ K. C. Davis, Administrative Law Treatise, §§2.02-2.07, 5.01 (1958).

111/ See note 54 supra. See also Sec. 719 of the Self-Government Act.

112/ The various legal opinions which have been prepared in recent years concerning the powers of the Council and Board under the Self-Government Act have focused primarily on what the Council's "outer limits" of control are over education. See the October 7, 1975 and February 22, 1977 opinions of the General Counsel to the Council; the October 22, 1975, January 27, 1977 and March 2, 1977 opinions of the General Counsel to the Board; and the December 5, 1975 opinion of the law firm of Arnold & Porter given to the chairman of the Council. All of these opinions overlooked the Hoover, Dean and Doyle cases, supra notes 107-109 which clearly established the Board's concurrent power over education with Congress under the 1906 Act.

point, an attempt by the Council to impose restrictions or prescriptions could be subject to challenge as divesting the Board of control or specifying how the funds for education must be allocated or adversely affecting the Board's powers and duties.

Whether to characterize the Board's concurrent powers as legislative or administrative is not a simple question. As discussed, the Board frequently functions in a legislative capacity. In many areas it makes rules of general application for the educational system free of any Congressional standards to guide its actions.[113/] However, the Board has always been viewed as an administrative Board, albeit one with broad powers.[114/] This apparent conflict between the characterization of an agency as administrative and the exercise of broad legislative powers has been the subject of much commentary[115/] and judicial confusion.[116/] Many courts in the past have been so fixed on the characterization of a legislatively created body as administrative as well as concerned with the problem of separation of powers, that they ignored the reality that

---

113/ See pp. 41-43 supra.

114/ The Self-Government Act deems it an "independent agency", Title IV Part I

115/ See K.C. Davis, Administrative Law Treatise (1958) §§2.01-2.16, 5.01-5.11, 9.01-9.07. L. Jaffee, Judicial Control of Administrative Action (1965) at 32.

116/ "In principle, legislation and administration are quite distinct powers; but in practical application the line which separates their exercise is not clearly marked or easily defined." Thompson v. Smith, 154 S.E. 579 (Va. Ct. App. 1930) at 584.

legislative power had been delegated.[117] However, the trend of recent cases has been to focus on the real and practical aspects of the delegation rather than to rely on an inflexible characterization.

Some of the real and practical considerations which militate against the inflexible characterization of the Board as "administrative" in nature have been discussed supra in support of the interpretation of concurrent Council-Board legislative powers over education. The further argument that separation of powers might prohibit the exercise of legislative powers by the Board is, of course, an insubstantial basis for refusing to acknowledge that the Board exercises powers of a legislative nature. Unlike a typical executive agency the Board is elected directly by and representative of the citizens of the District. In this regard it is like the Council and dissimilar to every other agency of the District.

However, no court has considered the powers of the Board in this context since the Self-Government Act was passed;[118] consequently whether the Board

---

117/ Professor Jaffee states that for many years "the courts somnambulistically insisted that the constitution, having placed the legislative power in the legislature, forebode the delegation of lawmaking power. Powers which produced comprehensive systems of regulation were upheld by explaining the administrative operation as a mere 'filling in of the details' or 'finding of the facts' pursuant to which the statute thus operated. Writers quite correctly and without difficulty ridiculed this hopelessly fictional rationalization." Jaffee, supra note 115 at 51.

118/ However, a case concerning this issue is pending. Evans v. Washington, Civ. A. No. 9393-76 (D.C. Superior Ct., filed Sept. 30, 1976). This case was originally filed in the United States District Court for the District of Columbia (Civ. A. No. 76-1808). The court abstained with respect to plaintiffs' claims under the Self-Government Act, and ruled that these should be heard by the Superior Court for the District of Columbia. Neither court has considered the intent of Congress with respect to the Self-Government Act.

acts legislatively as well as administratively is an open question. Its major importance for this discussion is that state courts in particular have occasionally applied different rules to transmissions of authority depending on whether the body had legislative power (making it subject to rules concerning delegation) or acted administratively (subject to subdelegation standards).[119/]

It is clear that Congress intended that the Council, within its legislative jurisdiction, would be able to create and modify agencies and other instrumentalities and to define their duties.[120/] Thus, within its jurisdiction, the Council has the power to provide for decentralization. To what extent could the Council authorize or compel delegation or subdelegation by the Board to further decentralization? Since Board control, powers or duties would not be adversely affected by Council authorization for delegation or subdelegation, such authorization would not appear to be inconsistent with the Self-Government Act. However, the Council would appear to be exceeding its powers if it sought to compel delegation or subdelegation of the Board's authority.

Council authorization for the Board to delegate or subdelegate authority to local boards and staff would clarify Board power and eliminate the uncertainty concerning the scope of Board concurrent power in this

---

119/ See pp. 62-68, 69-91 infra.

120/ Self-Government Act, §404, Code §1-144 (Supp. III 1976).

regard. The Council may also be able to eliminate or modify current provisions of Chapter 31 of the Code which prevent or restrict the Board from authorizing delegation of subdelegation of certain functions.[121/] However, if the Council attempted to require the Board to delegate or subdelegate its authority, particularly to local boards, this could be viewed as an attempt to divest the Board of part of its "control" over education.

121/ The barriers to decentralization that these provisions impose are considered in Part Two.

B. Judicial Interpretations Concerning Intent to Permit Delegation or Subdelegation

1. Decisions Pertaining to Delegation and Subdelegation in D.C.

As indicated previously, courts have generally blurred the distinction between delegation and subdelegation of authority. However, delegation properly refers to the transfer of legislative power to another body, agency, official, or jurisdiction. Subdelegation, on the other hand, means the transmission of authority from governing boards or heads of administrative agencies to subordinates.

The preceding discussion has focused on the statutory framework concerning Board powers, particularly as it might relate to the decentralization/delegation issue. What follows is the complementary examination of D.C. court decisions in this area.

Little precedent exists concerning delegation or subdelegation by the Board. Most case law pertains to the D.C. Commissioners, the Presidentially appointed (with Senate confirmation) governing body for the District prior to the Self-Government Act in 1973. The Commissioners were considered an administrative rather than a legislative body, yet in fact "legislated" concerning local affairs through their power to issue regulations.[122/] Thus their legal posture was analogous to the Board's.

122/ Reorganization Plan No. 3 of 1967 transferred the functions of the three D.C. Commissioners to an appointed Council and Commissioner.

The issue of transfer of authority by the Board received the attention of the courts in only one older case, Coleman v. District of Columbia.[123/] In Coleman, an applicant for a teaching position claimed that a letter from the secretary of the D.C. Board of Education, advising her that she had been appointed waived, at least implicitly, the Board rule requiring applicants to pass a physical examination. Prior to the receipt of the letter, she had been informed of the physical examination requirement and had submitted to the examination, which she failed to pass. Upon hearing the results of her medical exam, the superintendent rescinded the secretary's letter. The superintendent's action was subsequently ratified by the Board.

The court held that "she understood the appointment was conditional" on passing the medical examination, but went on to consider, in dictum, the power of the secretary to waive Board rules. The court said that the secretary "had no authority to employ teachers [it does not appear that the Board had attempted to confer such power on the secretary].

123/ 51 App. D.C. 352, 279 F. 990 (1922).

That authority was vested solely in the board of education..."[124/] The basis for this conclusion was that "[t]his power of appointment requires an exercise of judgment, and could not be delegated to the secretary or anybody else.[125/] The maxim "delegata non potest delegari" applies.

124/ 51 App. D.C. at 354. The court referred to Section 2 of the Act of June 20, 1906 (34 Stat. 316), which provided

> that the control of the public schools of the District of Columbia is hereby vested in a board of education... no appointment... of any... teacher... shall be made by the board of education, except upon the written recommendation of the superintendent of schools. The board shall determine all questions of general policy relating to the schools.... The board shall appoint all teachers in the manner hereinafter prescribed.

This provision is similar to language found in the Code, §31-101(a), and 102, 103.

125/ This has been described as the "traditional rule... that once the legislature has granted power to an agency or its chief, that power cannot be transferred to either a subordinate or an outsider." Note, School Decentralization: Legal Paths to Local Control 57 Georgetown Law Journal 991, 994 (1969).

Later D.C. cases, the federal courts in general, and some state courts have rejected the proposition that the exercise of judgment cannot be subdelegated and that power once delegated cannot be subdelegated.[126/] Of the three modern decisions pertaining to the D.C. Commissioners, two approved the subdelegation; one did not.

The most recent decision, Brown v. Tobriner,[127/] upheld the power of the D.C. Commissioners to create a board of appeals and subdelegate to the board the power to review the police chief's denial of licenses for rooming houses. The court derived the Commissioners' powers to subdelegate from a provision in the D.C. Code granting the Commissioners the power to issue regulations,[128/] which the court found implicitly included regulations which delegate jurisdiction over licenses.

An earlier case, Green v. Silver,[129/] held that the D.C. hackers board could properly deny licenses to taxicab operators on the basis of power subdelegated by the Commissioners. There was language in the Code which appeared specifically to authorize the Commissioners to subdelegate issuance of hackers licenses to their "designated agent." However, the court went beyond this narrow ground

---

126/ See pp. 62-91 infra.

127/ 218 F. Supp. 754 (D.D.C. 1963)

128/ 218 F. Supp. at 755-756.

129/ 207 F. Supp. 133 (D.D.C. 1962).

and appeared to suggest[130] that the Commissioners might also be able to delegate to the hackers board the power to revoke licenses even though the D.C. Code provided that the "commissioners are further authorized and empowered... to revoke any license issued hereunder when in their judgment, such is deemed desirable..."[131]

Prior to Green, a D.C. District Court, in dictum, had condemned the Commissioner's attempt to subdelegate the power to revoke hackers licenses to the hackers board in Frazier v. Silver.[132] Frazier was based on the language of the Code quoted above, which the Court viewed as expressing Congress' intention to place the "ultimate decision of suspension or revocation" in the Commissioners. The court indicated that only "ministerial duties or functions" could be subdelegated. While conceding that the hackers board was administratively responsible to the Commissioners, the court viewed the statute as imposing a greater duty even than administrative supervision.[133] General supervision of the Board was not enough. Rather, the court wanted to see evidence that the Commissioners "either approved, ratified, disapproved, modified or participated in the actions and decisions of the Board."

130/ 207 F. Supp. at 134, note 2.

131/ Code § 47-2345

132/ 185 F. Supp. 625 (D.D.C. 1960).

133/ 185 F. Supp. at 627

Frazier relied on an 1895 case, U.S. ex rel Kerr v. Ross.[134] Kerr held that the Congressional grant of power to the District Commissioners to make regulations governing plumbing did not justify the Commissioners subdelegating to a board of examiners the authority to determine the qualifications of plumbers for a license and to make "recommendations" to the Commissioners concerning the issuance of the license. Kerr held that only ministerial functions could be subdelegated and that the issuance of licenses was not ministerial.

Brown[135] implicitly rejected the view of Kerr and Frazier that only ministerial functions can be subdelegated, holding that the power to issue regulations furnishes authority to subdelegate the licensing function. Although the Brown opinion cites no cases, federal courts today would agree with Brown.[136] Moreover, it is unlikely that any court today would share the view of Kerr that the function of making recommendations may not be delegated. However, Frazier creates some doubt as to how well settled the law of subdelegation is in the District by suggesting that the Commissioners could only use administrative entities "to aid them in carrying out ministerial duties or functions." This uncertainty is

---

134/ 185 F. Supp. at 628, 5 App. D.C. 241 (1895).

135/ Note 127 , supra.

136/ See, e.g., Fleming v. Mohawk Wrecking and Lumber Co, 331 U.S. 111 (1947), and discussion at pp. 69-81 infra. Compare Larabee v. Bell, 10 F.2d 986 (D.C. Ct. of App. 1926).

heightened by the fact that a number of state courts continue to use the ministerial-discretionary function distinction to decide these issues.[137/]

It thus appears that some question may still remain concerning what principles should be applied to delegations or subdelegations by the Board. To consider this issue we will examine the principles other jurisdictions would apply to delegations by governmental bodies having legislative power or to subdelegations by entities having administrative authority.

137/ Moreover the opinion of both the General Counsel to the Board (February 10, 1975) and the D.C. Corporation Counsel (January 13, 1969) concerning delegation by Board of Education continue to rely on this distinction and the dicta in Coleman, supra, note 123.

2. The Board's Concurrent Legislative Power as a Basis for Decentralization

a. Introduction

The Board's power to delegate authority if it is viewed as exercising concurrent legislative power over education with the Council is considered in this section. Even if the Board exercises legislative power, it is power which Congress has delegated to it. The issue here is to what extent the delegation of authority by the Board in decentralization would be subject to the same standards for delegation as a "legislative" body or subject to the rules pertaining to subdelegation by administrative agencies.

b. The Federal Framework Regarding Legislative Delegation

The generally accepted federal rule is that Congress can delegate its legislative power to administrative agencies if accompanied by intelligible standards.[138] However, the government of the District of Columbia, of which the Board is a part, is no longer considered an administrative agency of the Congress. Congress, in large part, intended to delegate self-government to the citizens of the District. Unlike a federal administrative

138/ National Cable Association v. U.S., 415 U.S. 336, 342 (1974); U.S. v. Chicago, Mil. St. P. & P. R.R., 282 U.S. 311 (1930). See generally, Davis, Administrative Law Treatise, §2.00-1 et seq. (1970 Supp.) Professor Davis, however, finds that the tendency of the United States Supreme Court is no longer to insist on meaningful standards. He believes that courts are becoming more concerned about general safeguards against abuse of delegated power rather than automatically requiring standards. Id. at §2.00-5.

agency, the District government is not intended to implement national legislative objectives, but rather to serve as the vehicle for local democratic participation in the District and to exercise legislative powers.[139] The need for an intelligible standard for legislative delegation to the District is not apparent; and it is unlikely that this requirement, whatever its current viability, would be imposed on the initial Congressional delegation of legislative powers to the District government.[140] In this regard the delegation by Congress is similar to that by state legislatures to municipalities empowering them to legislate concerning local affairs and to exercise police powers absent state legislative standards.

c. The State Framework Regarding Legislative Delegation

In a number of cases state courts, recognizing that municipalities exercise legislative power, have tended to approve municipal decisions to delegate municipa functions to boards, commissions, and employees. Moreover, such cases appear to be the modern trend, based as they are upon the realities of government operations.

In Pressman v. Barnes, a Maryland court approved the creation by a municipal corporation of a director of traffic who was given the power to set

---

139/ Self-Government Act §§102(a), 302, 404, 495.

140/ See Davis, Id.

speed limits.[141] The court found that the state legislature had granted municipal corporations the "powers of legislation as to matters of local concern," and that the same basic rules applied to the delegation of legislative power by a municipal corporation as to the delegation by the state legislature.[142] The court then stated a general rule concerning delegation by municipal corporations:

> ...[I]t is now accepted that a municipal corporation may delegate to subordinate officials the power to carry ordinances into effect, even though such delegation requires the exercise of a certain amount of discretion which may be regarded as part of the police power, if such discretion is guided and restrained by standards sufficient to protect the citizen against arbitrary or unreasonable exercise thereof.[143]

In support of its decision, the court noted that the increasing "multiplicity and complexity of administrative affairs" had made it necessary to delegate important functions to administrative boards and officials. It also referred to the practical necessity for "constant supervision" and "expert and prompt judgment in the application of the concept of public safety to concrete situations" requiring the delegation of a reasonable amount of discretion to deal with changing traffic problems. The court ruled that standards must accompany the delegation of legislative power except where it is "impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will".[144]

141/ 121 A.2d 816 (Md. Ct. App. 1956).

142/ 121 A.2d at 820.

143/ Id.

144/ 121 A.2d at 822.

A number of state court opinions have similarly upheld municipal bodies delegating to administrative officials the authority to regulate traffic, based on the legislative powers of the municipality.[145] Other courts have reached the same conclusion as Pressman regarding delegation of discretion, but have phrased their holdings in terms of the traditional administrative-legislative dichotomy. For example, delegation of rule-making has been upheld on the ground that a municipal corporation can delegate authority to an administrative officer "to determine some fact or state of things upon which the ordinance makes or intends to make its own action depend."[146] The court upheld the delegation of substantial discretion in the exercise of the officer's actions by characterizing this discretion as "filling in the details" of a law, an "administrative function."

In other cases, the creation of commissions, boards, and offices by municipalities to perform delegated municipal functions has similarly been authorized.[147] In Adams v. Bryant, the creation by a municipality

---

145/ Taylor v. Roberts, 94 So. 874 (Fla. S.Ct. 1922); Stanley v. Vaughn, 17 P.2d 299 (Colo. S.Ct. 1932); Gould v. Western Dairy Products, 55 P.2d 274 (Cal. App. 1936). Compare Thompson v. Smith, 154 S.E. 579 (Va. S. Ct. 1930). Contra, Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355 (Mo. S.Ct. 1960).

146/ Borum v. Graham, 40 P.2d 856, 858 (Calif. App. 1935). In this case the police chief's discretion to place crosswalks was subject to the approval of the city manager; however, the court appears to consider the police chief as actually making decisions rather than merely making recommendations to the city manager. See also "Municipal Corporations", 62 C.J.S. §154.

147/ 370 S.W.2d 432 (Ark. S.Ct. 1963).

of a light and water commission composed of three citizen members was challenged because of the absence of specific authorization for its creation by the state legislature. The court held that, since the city had express authority to operate these utilities, it could designate agents to act for it in their management -- so long as the commission was only delegated functions which could be characterized as administrative and executive rather than legislative.[148/] The court found that the commission was a valid city agency.[149/]

Finally, some courts have upheld the creation of officers and delegation of responsibilities consistent with the Pressman decision based upon a theory of implied powers. Thus, in Burton Township, Genessee County v. Speck,[150/] the Michigan Supreme Court approved a township's creation of the office of commissioner, absent express statutory authorization, on the ground that this power could be implied

---

148/ The commission did not have the power to increase rates or issue bonds or notes.

149/ While municipalities frequently have been held to have greater authority to delegate portions of their business or proprietary powers than their governmental powers, and utilities are often seen as proprietary, Adams was not decided on this basis. See generally Antieu, Municipal Corporations Law (1975) § 5.30. See also, Miller v. City of Seattle, 70 P.2d 786 (Wash. Sup. Ct. 1937) (city council can create and abolish offices in the interest of economy and efficiency); State v. City of Seattle, 133 P. 11 (Wash. Sup. Ct. 1913) (city council can create offices as part of its legislative function unless in conflict with charter of constitution).

150/ 136 N.W.2d 731 (Mich. C.App. 1935), aff'd 144 N.W.2d 347 (Mich. Sup. Ct. 1966) (adopted Court of Appeals opinion).

from the legislative grant of power to make orders and bylaws for "directing and managing the prudential affairs of the township as they shall judge most conducive to the peace, welfare and good order thereof".[151/]

Many state courts do not follow the rule in Pressman and other cases cited here that a municipality's power to legislate is sufficient basis for it to delegate discretion and/or create officers or bodies to exercise delegated power. Unlike the D.C. cases pertaining to the powers of the Board,[152/] they presume the absence of power unless specific legislative authorization for action is present. And they frequently take the position that only ministerial functions, not discretionary, can be delegated by municipal bodies.[153/] This is the same standard as the older traditional rule applied by certain state courts to subdelegation by state administrative agencies, and is clearly not the modern trend.

State courts which do not examine the interests served by delegation and the safeguards for its exercise have attempted to resolve municipal delegation issues by (a) applying oversimplistic statements of principle to complex situations and (b) attempting to reconcile apparently

---

151/ 136 N.W. at 733. See also Haggerty v. Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958); Oakland v. Hogan, 41 Cal. App. 2d 333, 103 P. 2d 987 (1940).

152/ See pp. 54-60 supra.

153/ See generally McQuillan, Municipal Corporations (3rd ed. 1966), §10.38 et seq., which lists a number of state cases holding this more traditional view.

conflicting formulations of such legal principles. On the one hand, these state courts often strictly construe the powers delegated to municipal corporations, and presume that powers not expressly granted or implicit are denied.[154] As one court said, "[i]f reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city."[155] On the other hand, many courts also hold that: "Unless expressly or implicitly restrained by statute, a municipal corporation has discretion in the choice of means and methods for exercising the powers given to it for governmental or public purposes."[156]

Unfortunately, these two principles often appear to be in conflict, primarily because the distinctions they make only beg the question. Thus, it might be argued that, if a municipality has the authority to conduct a certain activity, one issue concerning the "method" or "mode" of accomplishing legitimate objectives is whether the governing body should retain all control over the activity, or delegate certain decisions

---

154/ McQuillan, supra, note 153. Several authorities on local government law suggest that this rule of strict construction, called Dillon's Rule for the author of an early treatise which stated it, has often been applied in a doctrinaire fashion because of an overly-simplistic reading of this early source, and is "subject to seemingly inexplicable vagaries of judicial application, often within the same jurisdiction". Sato & Van Alstyne, State and Local Government Law (1970).

155/ State v. Tampa Waterworks Company, 56 Fla. Sup. Ct. 859 (1908).

156/ Id. at 360 McQuillan, Municipal Corporations §10.29 (3rd Ed., 1966) states the rule as "[w]here the law is silent as to the mode, the rule of strict construction is not applied to the mode chosen by the municipal corporation exercising a power plainly granted."

to officers, boards or others.[157] Conversely, however, the particular "means and methods" for carrying out the identical power might be challenged as the exercise of powers not expressly or implicity authorized. For example, while the Board clearly has control over "education", the question remains whether decentralization is a mere "method" for the exercise of that control or whether it is an additional power implicitly restrained by statute. This confusion about what is the power and what is the method or means is aggravated by a third formulation often applied by state courts to municipal corporations, namely, that municipal governing bodies can only delegate ministerial or administrative functions and are prohibited from delegating discretion without specific charter or statutory authorization.[158]

Rather than relying on these dated and unrealistic judicial doctrines, Pressman and similar cases tend to emphasize that one aspect of legislative discretion is the freedom of a governing council to decide that certain decisions should be made by some other board or official for reasons of efficiency, changing conditions, expertise, or other good reasons so long as safeguards against arbitrary action are present. The Pressman standard of delegation is very similar to the federal court

---

157/ See, e.g., State v. Tampa Waterworks, supra, note 155 ; and Adams v. Bryant, 370 S.W. 432 (Ark. Sup. Ct. 1963).

158/ McQuillan, Municipal Corporations, §10.40-10.41 (3rd Ed. 1936).

doctrine of subdelegation -- particularly with respect to transfers of authority to subordinate employees.[159] Nevertheless, if the Board is viewed as exercising concurrent legislative authority, the Pressman standard may provide a more solid basis for at least certain types of delegations to local boards.

3. The Board's Power to Subdelegate if Considered an Administrative Body

a. Introduction

If the Board is not viewed as exercising legislative power subject to the principles of delegation discussed in the previous section, it likely will be considered an administrative body[160] governed by the principles of subdelegation. This section discusses the various federal and state court doctrines of subdelegation.

b. The Federal Doctrine of Subdelegation

(1) Introduction

As indicated in a previous section, the primary inquiry concerning subdelegation as it pertains to the Board is the question of Congressional

---

159/ See pp. 69-81 infra.

160/ See pp. 69-81 infra.

intent. If Congressional intent appears clearly otherwise, decentralization by subdelegation to local boards or staff is outside the ambit of Board authority. Similarly, if Congressional intent clearly indicated approval for subdelegation there would be no question of Board power in this regard. However, although Congress appears generally to favor neighborhood and community participation in the D.C. schools,[161/] and further, although in establishing the Board, Congress termed it an "independent agency",[162/] Congress was silent in the Self-Government Act concerning the extent to which the Board can subdelegate to local boards or staff. The most appropriate authority concerning what Congressional silence should portend for the power of the Board to subdelegate is the federal doctrine interpreting Congressional silence with respect to subdelegation in the case of other federally created administrative bodies.

Congress frequently delegates substantial administrative, quasi-legislative and quasi-judicial authority to various agency heads, boards or single officials. Subdelegation issues arise when agency heads subdelegate certain aspects of their Congressionally granted power to other boards or officials without express statutory authority for doing so.

161/ See pp. 19-22 supra

162/ Self-Government Act Title IV Part F.

However, despite the pervasiveness of subdelegation by Congressionally created agencies, challenges to legality in the federal courts are increasingly rare.[163/]

In those cases where the subdelegation issue arises, the threshold inquiry of the courts is whether Congress intended to permit the power it delegated to the agency head to be subdelegated to subordinates. Most commonly, as is the case with the District Board of Education, no statutory provision expressly authorizes the particular authority subdelegated. Consequently, the federal courts have had to develop principles for determining the legality of subdelegations in the absence of explicit Congressional intent.

Where statutory language is silent on the subject of subdelegation, the courts have indulged in certain presumptions worthy of note. Generally speaking, the view of the federal courts is that the absence of explicit statutory authorization for subdelegation creates no presumption against subdelegation.[164/] Moreover, some courts have gone further and presumed Congressional intent to permit subdelegation in the absence of statutory

---

164/ K. Davis, Administrative Law Treatise §9.01 (1976 Supp.): §9.07 (1970 Supp.)

165/ Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); Equal Employ. Op. Com'n. v. Raymond Metal Prod. Co., 385 F. Supp. 907 (D.Md. 1974). See Subdelegation by Federal Adminstrative Agencies, 12 Stan. L. Rev. 808, 810 (1960). Contrast Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942), but see dissent of Justice Douglas at 368, now the modern view.

language to the contrary.[165] One indication of an intent to subdelegate a particular function is a Board's customary subdelegation of that function.[166] This judicial reluctance to invalidate subdelegation may also be seen in the courts' fashioning of certain specific principles of statutory interpretation. Thus, while courts have expansively inferred an intent to permit subdelegation from an agency's general statutory authority to promulgate rules and regulations,[167] they have generally refused to consider an explicit statutory grant of power to a particular board or official as a constraint

---

165/ Wirtz v. Atlantic States Construction Co., 357 F.2d 442 (5th Cir. 1966); N.L.R.B. v. Barnes Corp., 178 F.2d 156 (1949); Evans v. I.T.U., 76 F. Supp. 881 (S.D. Ind. 1948); N.L.R.B. v. I.T.U., 76 F. Supp. 895 (S.D.N.Y. 1948). This view is also implied in U.S. v. Giordano, 416 U.S. 505 (1974) and certain recent legislation. See Davis §9.01 (1976 Supp.).

166/ N.L.R.B. v. Barnes, supra.

167/ Fleming v. Mohawk Wrecking and Lumber Co., supra; Wirtz v. Atlantic State Construction Co., supra; U.S. v. Marshall Durbin and Co., 363 F.2d 1 (5th Cir. 1966); N.L.R.B. v. Barnes, supra; Plapao Laboraties v. Farley, 92 F.2d 228 (D.C. Cir. 1937). This inference has also been applied to authorize subdelegation in the District. Brown v. Tobriner, supra note 127.

on the subdelegation of that power.[168] These judicial interpretations and attitudes are pragmatically based. As one court has indicated, "we think it unnecessary that Congress constitute itself a personnel bureau and set up job descriptions replete with all the myriad details of occupational qualifications."[169]

While rejecting statutory interpretations which would restrict subdelegation, the federal courts have freely examined a variety of interrelated factors in evaluating the validity of particular subdelegations of authority. These include the degree of subdelegation; the interests served by subdelegation; the interests affected by subdelegation; and safeguards against the arbitrary exercise of subdelegated power. Given a particular case, such as subdelegation by the Board to a local board or staff, one or more of these factors may be determinative of judicial approval.

(2) The Degree of Subdelegation

Federal courts have recognized that subdelegation is a matter of degree rather than an all or nothing proposition.[170] Duties subdelegated

168/ U.S. v. Giordano, 416 U.S. 505 (1974) (exception found in the general rule); N.L.R.B. v. Duval Jewerly Co., 357 U.S. 1 (1958); Earnest v. Moseley, 426 F.2d 466 (10th Cir. 1970); Automotive Parts and Acces. Ass'n. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968); Johnson v. U.S., 206 F.2d 806 (9th Cir. 1953); Porter v. Murray, 156 F.2d 781 (1st Cir. 1946). See also Shreveport Engraving Co. v. U.S., 143 F.2d 222 (5th Cir. 1944); U.S. v. Bareno, 50 F. Supp. 520 (D.Md. 1943).

169/ U.S. v. Vivian, 224 F.2d 53, 55 (7th Cir. 1955).

170/ N.L.R.B. v. Duval Jewelry Co., supra at 1100, 1101; Cudahy Packing Co. v. Holland, supra, dissent of Justice Douglas at 368; E.E.O.C. v. Raymond Metal Products Co., supra at 919, 920. See also Davis §9.01 (1958).

may range from those which are routine or "ministerial" and involve no personal evaluation, to those which are "discretionary" and primarily involve the exercise of independent judgment. Generally speaking, the more discretionary the duty delegated, the more carefully the federal courts will inquire into other factors such as the interests served and affected by subdelegation and the presence of adequate safeguards.

In many cases federal courts have approved subordinates holding hearings, reviewing evidence, making findings, and drafting opinions which were then adopted by the board or agency without review of the evidence.[171] In such cases the agency head retained the power to overrule the determination of the subordinate on appeal or by review, even though that authority was seldom exercised. It is the element of "ratification" that bolsters judicial approval of subdelegation in cases of this sort; since the agency head bears ultimate responsibility for the final decision, courts are hesitant to probe into the administrative details of the decision-making process.[172] For example, in U.S. v. Matherson,[173] a federal regulation required that a permit from a local commission be obtained before a similar permit would issue from the federal agency. Since the

171/ Magnesium Casting Co. v. N.L.R.B., 401 U.S. 137 (1971); Jay v. Boyd, 351 U.S. 345 (1956); N.L.R.B. v. Duval Jewelry Co., supra.

172/ U.S. v. Morgan, 313 U.S. 409 (1941); Braniff Airways, Inc. v. C.A.B., 379 F.2d 453 (D.C. Cir. 1967). See also Shreveport Engraving Co. v. U.S., supra.

173/ 367 F. Supp. 779 (1973)

ultimate decision-making power remained with the federal authority, the court determined that the regulation did not constitute an invalid subdelegation of decision-making authority to the local commission.

In other cases courts have sustained the subdeiegation of decision-making to subordinates, where in the normal course the agency head does not make the final determination.[174] In such cases, power to make final decisions is frequently subdelegated to one with particular expertise or experience, or is subdelegated subject to detailed standards of performance in order to safeguard affected interests.[175]

Finally, in a few cases, the courts have indicated that they will not permit subdelegation where it would amount to a total abdication of agency responsibility. Abdication has been found where basic or primary agency functions are subdelegated to subordinates under broad grants of authority.[176] However, rather than demonstrating judicial disfavor towards subdelegation, these cases underline the need for agency supervision of subordinates in areas of critical or essential agency concern.

174/ Fleming v. Mohawk Wrecking and Lumber Co., supra; Van Blaricom v. Forscht, 511 F.2d 615 (5th Cir. 1975); Earnest v. Moseley, supra; U.S. Health Club v. Major, 292 F.2d 665 (3d Cir. 1961); Johnson v. U.S., 206 F.2d 806 (1953).

175/ See KFC Nat'l Mgmt. Corp. v. N.L.R.B., 497 F.2d 298 (2d Cir. 1974), where final votes made by assistants to Board members were invalidated because made without prior instructions.

176/ U.S. v. Giordano, supra; KFC Nat'l Mgmt. Corp. v. N.L.R.B., supra; Relco, Inc. v. Consumer Prod. Safety Comm., 391 F. Supp. 841 (S.D. Tex. 1975).

(3) The Interests Served by Subdelegation

Perhaps the most common consideration in judicial decisions has been the justification and need for subdelegation.[177] Even though a statute may call for a particular board or official to make certain decisions, courts often examine to what extent it is realistic or practical for that board or official to make all or every aspect of such decisions. Federal courts generally have held that where it is impractical for the agency head to make all such decisions, subdelegation is proper in furtherance of the purpose and policy of the statute. The leading discussion of this aspect of subdelegation was made by the Supreme Court in Fleming v. Mohawk Wrecking and Lumber Co., where the court observed:

> ...the overwhelming nature of the price control program entrusted to the Administrator suggests that the Act should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts... We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction. Certainly, so far as the investigative functions were concerned, he could hardly be expected, in view of the magnitude of the task [footnote omitted], to exercise his personal discretion in determining whether a particular investigation should be launched. ...the pyramiding in Washington of all decisions on law enforcement would be apt to end in paralysis.[178]

177/ See, e.g., Fleming v. Mohawk Wrecking and Lumber Co., supra at 122; E.E.O.C. v. Raymond Metal Prod. Co., supra at 922; Braniff Airways, Inc. v. C.A.B., supra at 461; Wirtz v. Atlantic States Const. Co., supra at 445-6; U.S. v. Vivian, supra at 55-56; N.L.R.B. v. Barnes Corp., supra at 160; Porter v. Murray, supra at 786-787.

178/ 331 U.S. 111, 122 (1947).

In support of subdelegation as a manifestation of "administrative flexibility" which prevents agency "paralysis," the court in Mohawk Wrecking and Lumber Co. and others have cited statistics indicating a large volume of decisions to be made; the size of the agency; the number of affected persons, entities, or places, etc.[179] In addition, courts have considered subdelegation as a practical means of implementing the "purpose and policy" of government statutory obligations.[180] In the words of the Fifth Circuit Court of Appeals, the prohibition of subdelegation

> will mean less, not greater attention to the intrinsic merits of each situation requiring action. It will make governmental bureaucracy more, not less formidable and frustrating.[181]

In general, federal courts have permitted agency heads to subdelegate the multitude of day to day decisions so that they may devote their time to determining broader policy issues. The federal courts have been particularly solicitous of the need for agency heads to delegate quasi-adjudicative decisions to subordinates. Many federal agencies are required to make hundreds of thousands of individual determinations concerning the application of a general policy to particular facts. Federal courts have generally permitted agency heads to delegate such individual

179/ Magnesium Casting Co. v. N.L.R.B., supra at 142; Fleming v. Mohawk Wrecking and Lumber Co., supra at 122, note 14; Wirtz v. Atlantic States Construction Co., supra at 446, note 8; E.E.O.C. v. Raymond Metal Prod. Co., supra at 922, note 25; Porter v. Murray, supra at 786; Cudahy v. Holland, supra, Douglas' dissent at 368.

180/ See e.g., N.L.R.B. v. Barnes, supra at 160.

181/ Wirtz v. Atlantic States Const. Co., supra at 445.

determinations to subordinates.[182]

(4) The Interests Affected by the Subdelegation

It has not been possible for the federal courts to formulate a single rule pertaining to subdelegation because the courts, on a case by case basis, have considered the nature of the interests affected by the exercise of power subdelegated. For example, where sensitive constitutional rights are at stake, federal courts have been more concerned about subdelegation than in the case of the regulation of economic interests.[183] Generally speaking, the greater the interests involved, the more closely the courts scrutinize the subdelegation itself for sufficient standards to guide the actions of subordinate officials and for other safeguards such as the opportunity for review.[184] Nevertheless, with the exception of the Fourth Amendment interest in privacy from wiretapping,[185] the possibility that the subdelegated power would affect sensitive individual rights has not in

182/ See e.g. cases cited in note 171 supra.

183/ Compare U.S. v. Giordano, supra with Wirtz v. Atlantic States Constr. Co., supra. It appears that the Supreme Court in Giordano limited the power of the Attorney General to subdelegate determinations concerning wiretapping because of the court's antipathy toward wiretapping and the danger of abuse of constitutional rights.

184/ See E.E.O.C. v. Raymond Metal Prod. Inc., supra where subdelegation of administrative determinations was invalidated for lack of formal review by the Commission on appeal; Wirtz v. Atlantic States Constr. Co., supra, where initiation of lawsuits by regional attorneys was upheld due to subsequent ratification by the Secretary of Labor; Relco, Inc. v. Consumer Prod. Safety Comm., supra where issuance of a "public warning" (adverse express release) which amounted to an "economic death nell" for a consumer product was deemed to be excessive subdelegation of authority and the proper remedy was a full hearing by the Commissioner after the fact.

185/ U.S. v. Giordano, supra.

and of itself prevented subdelegation, i.e., this factor alone has not created a presumption that Congress did not intend subdelegation. Rather, its presence has resulted in the court focusing on the safeguards for the exercise of subdelegated power.[186]

It should be noted that even where subdelegation might be precluded due to an express statutory requirement or one implied from the protected nature of the interest affected, the courts would still permit "practicable administrative procedure in obtaining the aid of assistants in the department,"[187] since, strictly speaking, the use of assistants in this manner does not raise any issue of subdelegation.[188]

(5) Safeguards Against Arbitrary Action

Where decision-making power is subdelegated, courts typically have been concerned with the adequacy of the standards for exercise of that power by subordinates. No single rule concerning safeguards can be found in the cases since the ability to prescribe a specific standard is related to the subject matter and the three factors discussed previously - degree of subdelegation, interests served by subdelegation, and interests affected by subdelegation.[189]

186/ See cases cited in notes 171 and 174 supra.

187/ N.L.R.B. v. Duval Jewelry Co., supra at 7, quoting Morgan v. U.S., 298 U.S. 468, 481.

188/ See U.S. v. Vivian, supra at 56; Shreveport Engraving Co. v. U.S., supra at 226.

189/ For details see discussion of standards in the preceding three sections.

Due to the varying circumstances surrounding agency subdelegation and safeguards, it cannot be stated as a general rule that the courts will only permit subdelegation where meaningful standards to guide the exercise of subdelegated responsibilities have been prescribed.[190] However, since standards for performance (or similarly, the opportunity to review actions of subordinates) serve to minimize the risk of arbitrary agency action while fostering flexibility in the performance of necessary agency functions, the courts have generally referred to agency safeguards to bolster their refusal to invalidate subdelegation. And, based on particular facts in a few cases, courts have required standards of performance[191] or supervisory review of subordinates' actions by agency heads as a minimum safeguard for subdelegation.[192] Therefore, the absence of safeguards against arbitrary action in subdelegation may serve to undermine the validity of subdelegation in a particular instance, while the presence of certain minimal safeguards may encourage judicial support of subdelegation.

(6) Summary

In view of the number and complexity of factors encompassed by the federal doctrine of subdelegation, the result of its application to a

190/ See Davis §9.05-1 (1976 Supp.).

191/ Braniff Airways v. C.A.B., supra at 461, 462; Eastern Airlines v. C.A.B., 271 F.2d 752, 578 (1959) cert. den. 362 U.S. 970 (1960).

192/ See e.g., cases cited note 171 supra.

particular set of facts is difficult to assess. Nevertheless, it is clear that the courts, in examining the relevant factors, are deferential to the agency heads or boards involved. Where the agency head or board is in court defending the subdelegation of authority to subordinates and seeking to have subdelegation upheld, the federal courts are extremely reluctant to rule otherwise. On the other hand, where the agency head or board seeks to reject a claim of subdelegated decision-making, the courts have accepted the agency position in the absence of clear evidence indicating subdelegation of the authority in question.[193] Therefore, in addition to the four factors discussed previously, attention must also be focused on the formal memorialization of the subdelegation agreement, in order to insure its validity in the event of judicial dispute and to avoid prejudice to the rights of third parties who may be affected.

c. State Doctrines of Subdelegation

1. In General

As in the federal courts, the subdelegation issue for state courts is one of legislative intent. However, when the legislature is silent concerning subdelegation, state courts tend to be more reluctant than federal courts to permit subdelegation. Some state courts have adopted or are moving in the direction of the federal doctrine.[194] Many, however,

193/ N.L.R.B. v. Armstrong Tire and Rubber Co., 263 F.2d 680 (5th Cir. 1959). See also Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968) in which the court characterized a local school board as purely advisory in a dispute with the Central Board of Education.

194/ See generally 57 Geo. L.J. 992, supra note 37. Davis §9.06 (1958).

continue to apply the traditional rule that only ministerial functions can be subdelegated; discretionary authority cannot be.[195] The traditional rule reflects a presumption against subdelegation unless specific legislative authorization is present.[196]

195/ McQuillan, Municipal Corporations, §§10.40-10.41, 46.07 (3d Ed. 1966); Antieau, Municipal Corporation Law §5.32 (1975); Davis §9.06 (1958). This is the doctrine cited in the 1922 case in the District. Coleman v. District of Columbia, 51 App. D.C. 352, 279 F. 990 (1922); see p. 55 supra.

196/ The traditional rule and presumption were often inconsistently applied by state courts since municipalities were often permitted to grant municipal officers broad powers to regulate health, dangerous substances injurious activities and nuisances. The consistency of this exception with the main doctrine was seldom considered. It appears to have been based on the courts' judgment about necessity for subdelegation. See discussion and cases cited in Thompson v. Smith, 154 S.E. 579, 583 (Sup. Ct. Va. 1930). See also Porter v. City of Hot Springs, 287 S.W. 585 (Ark. Sup. Ct. 1926) (upheld subdelegation to Mayor to issue license to haul swill); Spiegler v. City of Chicago, 216 Ill. 114. (1905) (subdelegation to commissioner of public works to approve drip pans required for license of tank wagons to haul oil); City of Centralia v. Smith, 77 S.W. 488 (Kan. Ct. App. 1903). (Mayor can approve explosion of fireworks). Yonofsky v. Blanchard, 228 N.Y. 145, 42 N.E. 2d 7 (1942) (public health exception); Antieau, Municipal Corporation Law §5.33.

The rigidity of the traditional doctrine has been softened by some courts which permit administrative or executive authority to be delegated.[197] This qualification permits some authority to be subdelegated which otherwise might have been proscribed under the "no discretion" rule. These cases seldom discuss the difference between administrative functions and other discretionary functions which could not be subdelegated. Determinations appear to be made on the basis of whether the subordinate was functioning as the court believed an administrative official would function under the circumstances.[198]

Courts also have avoided the harshness of the traditional rule by finding that no subdelegation of authority takes place when a governing body or agency head formally approves decisions made by subordinates. In this case, state courts usually consider that the subordinate has merely gathered information or made a recommendation which the board has acted on. This characterization of decisions, which were actually made by subordinates but approved by a school board, was recently made by the Washington Supreme Court.[199] This approach has also been taken

197/ See, e.g., Kohler v. Benckart, 252 SW 2d 854 (Ky. Ct. App. 1952); Moy v. City of Chicago, 309 Ill. 242, 140 NE 845 (1923); Schwitzer v. Board of Education, 79 N.J. L. 342, 75 A. 447 (1910) cf. Pierce v. Lake Stevens Sch. Dist. No. 4, Snohomish Cty., 84 Wash. 2d 772, 529 P. 2d 810 (1974). See generally note 196 supra.

198/ Id.

199/ Pierce v. Lake Stevens Sch. Dist. No. 4, Snohomish Cty., 529 P. 2d 810 (Wash. S. Ct. (1974)).

by several state courts which approved local property tax officials' contracting with mass appraisal firms to reassess real property for tax purposes. Although private firms did all the work, the courts considered their reappraisals to be recommendations subject to the last word and final decision of the assessor. Consequently, the courts found no subdelegation[200]

A growing number of state courts, however, have taken an approach similar to the federal courts, recognizing that subdelegation is a matter of degree. These courts are less concerned about whether the subdelegated authority is ministerial, administrative or discretionary, and are more likely to examine the interests served and affected by subdelegation and safeguards against arbitrary actions.[201]

A New Jersey court, in State v. Imperatore, held that, "absent a legislative expression or circumstances cogently evidencing an intent that the governing body itself exercise the total power delegated to it, the legislature impliedly permits subdelegation of powers to agents in close touch with the problem and its specific demands."[202] The court, in

200/ Conroy v. City of Battle Creek, 314 Mich. 210, 22 N.W. 2d 275 (Mich. Sup. Ct. 1946); Gamboni v. Otoe County, 159 Neb. 417, 67 N.W.2d 489 (Neb. Sup. Ct. 1954); Tietjen v. Mayor and Aldermen of Savannah, 129 S.E. 653 (Ga. Sup. Ct. 1925); cf Brennan v. Black, 104 A.2d 777 (Del. Sup. Ct. 1954).

201/ See generally Davis §9.06 (1958).

202/ State v. Imperatore, 92 N.J. Super. 347, 233 A.2d 498, 500-501 (1966) cert. denied 48 N.J. 442, 226 A.2d 431 (1967).

affirming the authority of the New Jersey Turnpike Commission to subdelegate the power to reduce speed limits to its agents, noted that "emergent and transient" conditions required flexibility, and that the opportunity for judicial review of criminal charges to challenge violation of the speed limits was a safeguard against arbitrary action.

In another leading state case the Wisconsin Supreme Court announced the rule that even where an executive officer must exercise his own judgment and discretion in making an order, he is not precluded

> from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and their recommendations in relation to the advisability of their order, and also to draft it in the first instance. 203/

The adequacy of the standards accompanying the subdelegation has also been of concern to a number of state courts. 204/

In addition, a number of state courts have considered the necessity of subdelegation for the effective operation of the agency. The need for subdelegation has been its justification in a number of circumstances, including the subdelegation of power to determine entrance

203/ School District No. 3 of Town of Adams v. Callahan, 297 N.W. 407 (Wisc. Sup. Ct. 1941); see also Kiernan v. Bronstein, 73 Misc. 2d 629, 342 N.Y.S. 2d 977 (1973).

204/ Poporis v. City of Warson Woods, 352 S.W.2d 605 (Mo. Sup. Ct. 1962); Schmitt v. Plonski, 215 N.Y.S. 2d 170 (Suffolk Cty. Sup. Ct. 1961); Northern Boiler Co., v. David, 106 N.E.2d 620 (Ohio Sup. Ct. 1952); Keating v. Patterson, 132 Conn. 210, 43 A.2d 659 (Conn. Sup. Ct. of Errors 1945); Thompson v. Smith, note 145 , supra; Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960).

salaries because efficient administration would otherwise be diffi ..t, "if not impossible";[205] to permit an assessor to hire experts to assist him on a problem which required more than one assessor;[206] to allow commissioners to make decisions based on the recommendations of referees who heard the evidence or read the record;[207] to permit a turnpike employee to change the posted speed limit;[208] and to permit a mayor to subdelegate authority to a special assistant to make determinations concerning the legality of work stoppage by police officers and to permit the special assistant in turn to act on the recommendations of independent attorneys where 18,000 affidavits had to be reviewed.[209]

2. Subdelegation by School Boards

In most cases in which state courts have considered subdelegation by school boards, the traditional doctrine that only ministerial functions can be subdelegated has formed the basis of the decision. Typically, these state courts have simply declared that the decision which was subdelegated was either ministerial and could be subdelegated, or discretionary

205/ McGovern v. Patterson, 273 App. Div. 35, 75 N.Y.S. 2d 492 (1948) aff'd 298 N.Y. 530, 80 N.E.2d 667 (1948).

206/ Conroy v. City of Battle Creek, 314 Mich. 210, 22 N.W.2d 275 (1946).

207/ Pacific Indemnity Co. v. Industrial Acc. Commission, 28 Cal. 2d 329, 170 P.2d 18 (1946); California Shipbuilding Corp. v. Industrial Acc. Commission, 27 Cal. 2d 536, 165 P.2d 669 (1946); Taylor v. Industrial Acc. Commission, 38 Cal. App. 2d 75, 100 P.2d 511 (1940).

208/ State v. Imperatore, supra, note 202.

209/ Kiernan v. Bronstein, supra, note 203.

and could not be.[210] The basis for these conclusions is seldom discussed. Consequently, predicting outcomes is difficult.

Several recent decisions by the Supreme Court of Washington illustrate the vagaries of traditional subdelegation doctrine applied to school districts by state courts. In 1973 the court in Noe v. Edmonds School District No. 15 of Snohomish Cty.,[211] held that a board of education could not subdelegate discretion to the superintendent to place a teacher on probation for violating a board rule prohibiting corporal punishment. The court found that this determination was a discretionary function which the board had to make itself and not a ministerial or administrative function which could be subdelegated.[212]

Pierce v. Lake Stevens School District No. 4, Snohomish Cty., decided the following year by the same court, took a much more practical

210/ Board of Education of Marshall Cty. v. Baugh, 199 So. 822 (Ala. Sup. Ct. 1941) (dismissal of teachers requires the exercise of discretion and cannot be subdelegated); Steele v. Board of Trustees of Pittsburgh Public Schools, 9 P.2d 217 (Cal. Ct. of App. 1932) (serving notice of dismissal ministerial); Big Sandy School District No. 100 v. Carroll, 433 P.2d 325 (Colo. Sup. Ct. 1967) (making a contract with a teacher is discretionary and cannot be subdelegated); Elder v. Board of Education of School District No. 127 1/2, 208 N.E.2d 423 (Ill. App. Ct. 1965) (power to employ teachers discretionary and cannot be delegated). Schwitzer v. Board of Education of City of Newark, 75 A. 447 (N.J. Sup. Ct. 1910) (advertising for and opening bids are ministerial functions).

211/ 515 P.2d 977 (1974).

212/ The court said that school districts are "municipal or quasi-municipal corporations" (515 P.2d at 980), but applied a more restrictive rule concerning subdelegation than many courts apply to municipal corporations. See pp. 62-69 supra.

view of subdelegation by school districts, completely ignoring its previous decision.[213] In Pierce the school district laid-off teachers because of a financial crisis. The decisions concerning which teachers were to be laid-off and which programs were to be curtailed were in fact made by principals and other staff, with the board formally approving these decisions. The court believed that heavy reliance on staff was "the only practical manner in which [the board] could gather the information necessary to make an intelligent judgment." The court refused to find that the legislature intended that the board "should perform the functions of professionals."[214]

Although the record shows that principals actually made the determinations concerning which teachers were not to be hired and the board exercised no personal judgment concerning individual teachers,[215] the court characterized the principals' role as making "recommendations" because the Board formally approved these decisions.

213/ 529 P.2d 810 (1974).

214/ 529 P.2d at 817. The board's determination that this was the only "practical manner" in which this matter could be handled was based upon the Board having to reduce its staff by 27 teaching positions. The Board of a large school district such as Washington, D.C. undoubtedly must, in short periods of time, make personnel decisions concerning many more than 27 staff positions.

215/ Excerpts from record quoted in brief of appellants in the Washington Court of Appeals at 35-36.

Additionally, the court's approval appears to have been affected by the fact that the board specified general criteria which principals were to follow in deciding which teachers to let go.[216] Principals, in fact, made the decisions, but their discretion was guided by criteria established by the board.[217]

Principals clearly exercised substantial discretion in Pierce. The fiction that the board exercised its "intelligent judgment" by formally approving decisions made by staff appears to have justified the court in ignoring the ministerial-discretionary doctrine. The court recognized the inadequacy of this old doctrine in the face of the board's need to rely on the judgment of others but fails to replace it with an intelligible standard -- except perhaps that decisions made by subordinates if approved by the board raise no issue of subdelegation. Noe and Pierce are symptomatic of the difficulties that state courts have had in dealing with subdelegation issues.

The interests of those affected by school board subdelegation appears to have influenced the decisions of several courts. For example, in California School Employees Association v. Personnel Com'n. of P.V.U.S.D., a school district had deviated from specific statutory

216/ 529 P.2d at 816-818.

217/ Cf. Minielli v. Clarkston School District, 539 P.2d 690 (Wn. App. Ct. 1975).

procedures established for dismissal of civil service personnel.[218] While the court cited, without analysis, the ministerial-discretionary doctrine, it appeared more concerned that teachers not be arbitrarily dismissed and that civil service employees, "have the statutory procedures for dismissal strictly followed."[219] The California case illustrates that courts are likely to strictly construe statutes specifying detailed procedures for dismissal of personnel, in order to protect the interests which the statute intended to protect.[220]

In many of the cases involving school districts, the boards have denied that they intended to subdelegate authority. The plaintiffs in these cases have challenged or relied on alleged actions by one who was not authorized by the board to perform such actions.[221] These cases

218/ 474 P.2d 436 (Cal. Sup. Ct. 1970).

219/ 474 P.2d 436 at 440. The court did not reach the issue of whether the board could have subdelegated the power to dismiss subordinates since the board had in fact made no such subdelegation.

220/ See Heuman v. Independent School District No. 77, 67 N.W.2d 38 (Minn. Sup. Ct. 1954). The Minnesota Supreme Court, which has been relatively liberal in permitting subdelegation (see School District No. 3 of Town of Adams v. Callahan, 297 N.W. 407 (Wisc. Sup. Ct. 1941)), so strictly construed detailed statutory personnel procedures that it even refused to apply the ministerial-discretionary distinction in refusing to permit a superintendent to accept a teacher's resignation pursuant to a subdelegation by a board. See also Board of Education of Marshall Cty., v. Baugh, 199 So. 822 (Ala. Sup. Ct. 1941). However, these two cases, in not applying even the traditional rule, are unusual.

221/ Big Sandy School District No. 100 v. Carroll, supra, note 210 ; State Board of Education v. Elbert Cty. Board of Education, 146 S.E. 2d 344 (Ga. Ct. of App. 1965); Elder v. Board of Education of School District No. 127 1/2, supra, note 210 . Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968); cf. Coleman v. District of Columbia, supra, note 123.

have not squarely confronted the issue presented by decentralization in which subdelegation has been authorized by the central board. However, they demonstrate the wisdom of having a board of education specifically to delineate the authority it is subdelegating so that both the subordinates and the public are clearly aware of the extent of subdelegated authority.

d. Which Subdelegation Doctrine Applies to Decentralization by the Board

Should the doctrine of subdelegation applied by the federal and some state courts be used to judge the subdelegation which would occur in decentralization authorized by the D.C. Board of Education? Or should the traditional ministerial-discretionary doctrine still used by many state courts apply?

In general, federal courts today hold there is implied authority for agency heads to subdelegate such authority to subordinates as is necessary to perform the work of the agency and to prevent the head of the agency from being inundated with a multitude of day to day decisions. In this regard, federal courts often consider both the extent of subdelegation and the extent of retained power to review or revoke subdelegated authority in the governing officer or body. They also frequently consider the interests affected by the subdelegated authority and scrutinize the adequacy of standards and procedures to prevent arbitrary action in the exercise of subdelegated power.

A number of more modern state court opinions have weighed many of the same factors as the federal courts. Others, however, apply the older traditional subdelegation doctrine which prohibits conferring discretionary functions on subordinates. This doctrine has sometimes been mitigated by permitting "administrative" functions, as well as ministerial ones, to be subdelegated and by considering decisions of subordinates which are approved by the governing officer or board as not involving subdelegation.

We have concluded that federal doctrine is the appropriate standard to apply in considering decentralization in the D.C. schools for two primary reasons. First, the Board is a Congressionally created entity. Subdelegation is a question of Congressional intent. The federal doctrine is applied by federal courts when Congressional legislation is silent on subdelegation to judge the validity of subdelegation by such entities. Second, federal doctrine, in its greater recognition that subdelegation is a matter of degree and its weighing of the need for subdelegation and the safeguards necessary to prevent arbitrary action, is more sensitive than the older rule both to how large governmental organizations actually function and to the interest in avoiding arbitrary decisions. Furthermore, in this respect it is identical to the modern state doctrine.

In 1922, when this issue last arose in the D.C. schools, the court applied the traditional rule. At that time both federal and state courts generally applied the traditional rule.[222] Subsequently, the federal courts have taken a more favorable view of agency discretion to determine the nature and scope of subdelegation.[223] And cases concerning subdelegation, which have arisen more recently in the District, although not dispositive with respect to Board powers, have tended to favor subdelegation.[224]

222/ Coleman v. District of Columbia, 51 App. D.C. 352.

223/ See discussion pp. 69-92 supra.

224/ See discussion pp. 54-60 supra.

It could perhaps be argued that the federal law of subdelegation in 1906, when Congress first enacted the provisions of the present D.C. Code and gave an appointed school board control over the D.C. schools, should be applied. This argument has little merit. The present Board derives its powers from the 1973 Self-Government Act, not from the 1906 Code. The fact that the 1906 Code also gave the Board "control" as did the Self-Government Act is irrelevant. Congress in 1973, in enacting the Self-Government Act, was far more likely to have known about and intended the application of present federal law concerning agency subdelegation than the doctrine of 68 years ago. Consequently we conclude that the current federal law of subdelegation should be used to consider Board subdelegation under the Self-Government Act. Even if the choice of law were an open question, the traditional doctrine would appear to have little to recommend it since its formulation is too simplistic to permit reasoned application.

Many state cases concerning subdelegation, particularly in school districts, fail to recognize that subdelegation is a matter of degree. Most resort to an unexamined recital of the ministerial-discretionary doctrine. These decisions virtually ignore the complexity of subdelegation and the extent to which reality does not fit neatly into the discretionary, administrative and ministerial categories.[225] The image

225/ See cases note 210 supra.

of the school board reflected in these opinions appears to be of a small group of persons able to maintain relatively close personal contact with teachers, parents, pupils and administrators -- a board which has the capacity to exercise individual judgment concerning hiring, firing, discipline, promotion and transfer of each staff member, every contract for goods and services, and the details of each line item of the budget - and which is also required to establish broad educational and fiscal policies and guide the district through periodic fiscal crisis. Such an image may have been accurate for most school districts 50 years ago. It still probably typifies the remaining small town and rural districts. However, this image is no more accurate a portrayal of a large urban district like that of the District of Columbia today than it is of a federal agency.

In order to describe accurately the actual subdelegation that occurs in a school district today-- not only that which would occur under decentralization -- subdelegation must be characterized as a matter of degree. Authority is seldom exclusively exercised either by a governing board or by employees. Typically school board actions are based upon staff recommendations which, <u>in fact</u>, are not individually reviewed by the board, e.g., when it hires teachers. While this may result in a court characterizing board employees as merely making recommendations to the board, in actuality the decision has been made by employees. When the board formally approves these decisions by others, this signifies

that, while the board has not completely alienated its authority, in large measure it is not the board that is actually making the decisions. Rather, these have been subdelegated.

The board typically makes decisions about general policy, but general policies are often framed in abstract terms. Consequently, the real policy decisions are often made by staff members in applying general policies to particular circumstances.

No school system could function if the board of education or the superintendent had to make the multitude of individual decisions required every day in a school system of over 100,000 students, over 6,000 staff members and over 100 schools, as is the case in Washington, D.C. Of necessity, a board of education already subdelegates most decisions, in number and probably in terms of importance, to its staff, even in the most highly centralized systems.

Theoretically a board of education could attempt to specify the details of the curriculum and the activities of a teacher during every minute of the day. However, even in this case a board would probably be forced to rely, because of limits of time and lack of information, on the judgments of others to make such detailed decisions. Instead, boards typically give great latitude to staff members concerning budgetary, educational, student conduct and personnel matters.

C. Decentralization Involving Local Boards

1. Introduction

The general legal principles that pertain to delegation and subdelegation of authority have been considered in previous sections. In this section the subset of issues raised by the participation of local boards in decision-making at the school or regional levels will be discussed.

Little direct precedent concerning local boards exists. Consequently, delegation and subdelegation issues which have arisen in similar contexts are explored, e.g., delegation to private parties.

In considering the propriety of delegating authority to private groups such as professional associations or teachers unions, courts have considered highly relevant the special interest or expertise of the group exercising the delegated power. Thus, we will also examine the particular interests relating to education which have been recognized by the courts. Because local boards are likely to consist exclusively or in part of parents, we will discuss the special interests of parents in the education of their children. In addition, we will focus on the related and perhaps analogous area of teachers' interests as evidenced in collective bargaining cases.

The question of how local boards should be characterized is important. Should they be considered private parties or autonomous bodies with separate identities and interests from the school system; or as instrumentalities of the central Board assisting in administering the system? We are of the opinion that which characterization is applied will largely depend on how the central Board structures its relationship with local boards. In general, the more formal the control which the Board exercises the more likely it is that local boards will be considered instrumentalities or subordinates and their participation upheld. This section discusses general alternatives for structuring the Board's relationships with local boards.[226/]

As previous analysis has shown, the principles often applied (a) to delegation by municipal bodies having legislative powers and (b) to subdelegation by administrative bodies (in federal and modern-trend state courts) are

---

226/ Alternatives are also considered in the discussion of functions in Part Two.

nearly indistinguishable. Both principles generally presume that delegation or subdelegation was intended to be permitted unless a contrary intent is present. Both find relevant the extent of delegation or subdelegation, the interests served by the transfer of authority, the interests affected and the safeguards for protecting those interests. Moreover, courts often use the term "delegation" to refer to both subdelegation and delegation. Consequently, in this section, we will not distinguish between them unless the context requires it - both will be termed "delegation."

2. Delegation to Private Parties

a. Introduction

Although it is unlikely that local boards would be considered private parties if delegated authority pursuant to a decentralization plan, the principles courts have applied when considering delegations to private parties remain instructive. In the cases considered below, the private parties have generally had preexisting identities and well-recognized private interests prior to the delegation. Moreover, the interests of such groups, e.g., trade and professional associations, unions, and tobacco growers, are generally

identifiable and in certain circumstances may conflict with broader public interests.

Perhaps because of the exceptional nature of such delegation, with its possibility of conflicts of interest, virtually all of the cases have involved delegations by bodies having legislative power -- Congress, state legislatures or municipal corporations. Thus, if local boards are characterized as private parties, it is likely that substantial delegation of board power to them would be approved only if the board's powers are considered legislative.[227]

However, because of the substantial differences between the private parties involved in these cases and local boards, we have concluded that such boards should not be considered private parties -- particularly if the central board is careful about how delegation is structured.[228] It is the inability of the public body to control the internal operations, as well as the preexisting special private interests, of the private group which distinguish it from a local board whose selection, composition and internal workings are within the board's control. In other words, the local board can be created as a subordinate instrumentality of the board, while a private group cannot be. Nevertheless, despite this distinction, the principles developed in the context of the more extreme delegation to private parties should be useful for considering delegation to local boards.

227/ See pp. 61-69, supra.

228/ See pp. 69-92, supra.

Case law concerning delegation to private parties is often inconsistent and confusing, appearing more closely aligned to the facts of a particular case than to clearcut judicial standards. However, as mentioned previously, considerations relating to the special interests of the private parties involved have often been a primary focus of the courts in either upholding or rejecting delegation.

b. The Federal Courts

The major Supreme Court cases on the subject of delegation to private parties were handed down in the 1930's and 1940's. Since that time, the Court has made no further enunciations on clarifications. More recent federal court decisions have emphasized those cases permitting delegation,[229/] while cases which propounded the "doctrine of non-delegation"[230/] have fallen into disuse.

The standards delineated by the Supreme Court in Currin v. Wallace summarize the holdings in those cases which found delegation to private parties constitutional, and distinguish those cases where unconstitutionality was determined. In Currin, a federal statute provided that markets for

229/ Parker v. Brown, 317 U.S. 341 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); U.S. v. Rock Royal Co-op, 307 U.S. 533 (1939); Currin v. Wallace, 306 U.S. 1 (1939).

230/ Carter v. Carter Coal Co., 298 U.S. 238 (1936); Washington ex rel Seattle Trust v. Roberge, 278 U.S. 116 (1928); See also Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

the grading and inspection of tobacco were to be designated by the Secretary of Agriculture subject to referendum and two-third vote of the tobacco growers. Despite this referendum provision, the court found no unconstitutional delegation of legislative power.

> Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it....' This is not a case where a group of producers may make the law and force it upon a minority [citations omitted] or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners [citations omitted]. Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions.231/

Of course, Currin involved a federal statute. Subsequently, in Parker v. Brown, the Supreme Court affirmed the constitutionality of a state agricultural law which authorized the appointment of committees by local producers to establish local marketing programs, which programs were adopted after review by a State Commission and the consent of 65% of the producers owning 51% of the acreage for a particular crop.

As mentioned previously, the federal courts have ceased to follow the doctrine of non-delegation of legislative powers.232/ Thus, the lower

231/ 306 U.S. at 15-16.

232/ See K. Davis, Administrative Law Treatise §2.15; Corum v. Beth Israel Medical Center, 373 F. Supp. 550, 553 (S.D. N.Y. 1974).

federal courts have upheld a statute which required approval by a hospital council of HEW regulations, noting the particular qualifications and interests of those private persons on the council as well as the retention of final control in the Secretary.[233] Subdelegation by the Civil Service Commission to local voluntary agencies has also been upheld due to the issuance of standards and review by the Commission.[234] Similarly, the delegation of rulemaking and disciplinary powers to the private National Association of Securities Dealers, subject to SEC approval and review, has been deemed constitutional.[235]

In the area of state law, the federal courts have indicated an approach consistent with their treatment of federal statutes. For example, they have upheld state delegation of licensing authority for convalescent homes to voluntary agencies, due to the particular qualifications of the members, the existence of guidelines for their actions, and the review power retained by a state agency.[236] They have, similarly, supported the right of states to require attendance at a law school accredited by the American Bar Association as a condition to membership in the state bar, citing the ABA as a national organization dedicated

233/ Corum v. Beth Israel Med. Ctr., 373 F. Supp. 550 (S.D.N.Y. 1974).

234/ United Black Fund v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

235/ R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir. 1952) cert. denied 73 S. Ct. 94.

236/ Simon v. Cameron, 337 F. Supp. 1380 (C.D. Ca. 1970).

to maintaining high professional standards.[237]

In summary, the tendency of the federal courts has clearly been toward liberality in the area of delegation. Perhaps for this reason, federal decisions concerning delegation to private parties have generally been sketchy in their analysis and discussion of the constitutional issues and judicial standards involved. Nevertheless, the holdings of the courts in these cases appear to derive from one or more of the following specific considerations:

1) the particular qualifications or interests of those delegated authority;

2) retention of final review authority in a public agency or officer;

3) the issuance of standards to guide decision-making by private parties.

More general, but encompassing all of the above considerations, is the standard formulated by one court: "Concepts of control and accountability define the constitutional requirement."[238]

c. The State Courts

In marked contrast to the federal support of delegation to private parties, state court decisions have been described as "unsteady and conflicting."[239] Perhaps the most influential and representative state

237/ Lombardi v. Tauro, 470 F.2d 798 (1st Cir. 1972) cert. denied 412 U.S. 919 (1972); Potter v. N.J. Supreme Court, 403 F. Supp. 1036 (D.N.J. 1975).

238/ Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

239/ K. Davis, Administrative Law Treatise §2.14.

court decision was rendered in Group Health Ins. of N.J. v. Howell,[240] where the court noted the dangers of self-interested decision-making in the delegation of approval for medical services corporations to private medical societies. However, the court emphasized that this flaw could be remedied if accountability were ensured in the form of "standards or safeguards."

> ...power to determine who shall have the right to engage in an otherwise lawful enterprise may not validly be delegated by the legislature to a private body which, unlike a public official, is not subject to public accountability, at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action.[241]

Due to the absence of safeguards and the problems of self-interest inherent in the Group Health situation, the court struck down the delegation for lack of a "reasonable relation to a proper legislative purpose." In a similar case, private school determinations concerning transportation of private school students with public funds were found to be "unreasonable"

240/ 193 A.2d 103 (N.J. Sup. Ct. 1963) supplemented 202 A.2d 689 (1964). For other cases of the same view, see N.J. Dept. of Transportation v. Brzoska, 354 A.2d 650 (N.J. App. 1976) - airport owner determination of aviation licenses; Bayside Timber Co. v. Bd. of Supervisors, 97 Cal. Rptr. 431 (Cal. App. 1971) - formulation of timber rules and regulations by timber interests; Blumenthal v. Board of Medical Examiners, 368 P.2d 101 (Cal. Sup. Ct. 1962); Fink v. Cole, 97 N.E.2d 873 (N.Y. App. 1951) - jockeys licensed by a private Jockey Club; Abelsons, Inc. v. N.J. State Board of Opticians, 75 A.2d 867 (N.J. Sup. Ct. 1950); Johnson v. Milk Marketing Board, 295 N.W. 346 (Mich. Sup. Ct. 1940).

241/ 193 A.2d 103 at 108.

delegations of authority to private persons because policies, standards and safeguards against the abuse of self-interest were lacking.[242]

The "standards or safeguards" required for delegations to private parties vary with the circumstances involved. Actually, the emphasis of the state courts seems to be on safeguards -- for the issuance of standards for decision-making, a power of review, and the particular qualifications of private parties are merely different types of safeguards against arbitrary and uncontrolled actions. All or one of these factors may cause the delegation of authority to a private party to stand or fall in the state courts.

Standards to guide the decision-making of private parties must be set out "as definitely as is reasonably practicable."[243] However, in some case usually involving an independent event[244] or the acknowledged high qualifications of th

242/ Jennings v. Exeter - West Greenwich Reg. School Dist. Comm., 352 A.2d 634 (R.I. Sup. Ct. 1976).

243/ Wilson v. Conn. Prod. Develop. Corp., 355 A.2d 72 (Conn. Sup. Ct. 1974) See also Kugler v. Yocum, 445 P.2d 303 (Cal. Sup. Ct. 1968).

244/ See e.g., Aero Motors, Inc. v. Administrator, Motor Vehicle Admin., 337 A.2d 685 (Md. App. 1975); Kugler v. Yocum, 445 P.2d 303 (Cal. Sup. Ct. 1968); La. Motor Vehicle Comm. v. Wheeling Frenchman, 103 So.2d 464 (La. Sup. Ct. 1958); Kansas Tob-Candy Distrib. v. McDonald, 519 P.2d 1110 (Kan. Sup. Ct. 1974).

private parties,[245] no specific standards have been required. In other cases, standards may be explicit in the law or in administrative regulations[246] or may be implied,[247] particularly from legislative policy.

The retention of a power of review in a public agency or office is a primary safeguard which ensures control and accountability; this retention may even cause a court to find that no delegation has actually occurred. Moreover, review power has been implied by at least one state court, in order to provide the county board of supervisors with oversight authority for actions taken upon petition of a majority of taxpayers.[248] In a related area, another court has found that a legislature "may enact laws which will become operative upon the affirmative vote of the people of the district to be affected," since the ultimate decision

245/ See e.g., People v. Barksdale, 503 P.2d 257 (Cal. Sup. Ct. 1972) - hospital accreditation by private committee; Register v. Milam, 188 So. 2d 785 (Fla. Sup. Ct. 1966) - selection of pilot apprentices by licensed pilots; Colo. Polytechnic College v. State Bd. of Comm. Colleges and Occup. Education, 476 P.2d 38 (Colo. Sup. Ct. 1970) - college certification by private organization; City of Cleveland v. Lausche, 49 NE 2d 207 (Ohio App. 1943) - operation of municipal zoo by a non-profit organization; Floyd v. Thornton, 68 S.E. 2d 334 (S.C. Sup. Ct. 1951) - some state board of banking members appointed by bankers.

246/ See N.J. Dept. of Transportation v. Brzoska, 354 A.2d 650 (N.J. App. 1976); K. Davis, Administrative Law §2.

247/ Group Health Ins. of N.J. v. Howell, supra.

248/ Ricca v. Bojorquez, 473 P.2d 812 (Ariz. App. 1970).

remains with the legislature.[249]

The personal qualifications of parties delegated authority also affect judicial determinations. As discussed previously, the potential for self-motivated abuse triggers a need for standards or other safeguards to avoid such abuse.[250] Conversely, where the parties' qualifications and standards are deemed to be high and closely related to the authority delegated, few or no other safeguards to control decision-making may be necessary.[251]

The delegation of authority to a private person or group has also been upheld by viewing "its character, its relations, and its functions," and thereby determining that the persons involved are actually accountable public officers.[252] For example, in Penn School District No. 7 v. Lewis-Cass Intermediate School District, delegation to a temporary "reorganization committee" was upheld by considering the committee as a public body subject to defined standards of a general nature for performance and decision-making.

249/ Malito v. Marcin, 303 N.E. 2d 262 (Ill. App. 1973).

250/ See p. 106 supra.

251/ See cases note 245 supra.

252/ See e.g., Dearborn Firefighters Union v. City of Dearborn, 201 N.W. 2d 650 (Mich. App. 1972) and Warwick v. Warwick Reg. Fireman's Ass'n., 256 A.2d 206 (R.I. Sup. Ct. 1969) - arbitrators as public officers; Penn. School Dist. No. 7 v. Lewis-Cass Intermediate School Dist., 165 N.W. 2d 464 (Mich. App. 1968) - reorganization committee as a public body: cf O'Bryan v. City of Louisville, 382 S.W. 2d 386 (Ky, Ct. App. 1934) - commission jointly controlled by private foundation and city operated a municipal zoo.

The preceding discussion clearly demonstrates the absence of universal legal principles concerning delegation to private parties. However, in both federal and state court cases one or more of the following criteria appear to have been the key to sustaining such delegations:

- the special interest or unique qualifications of the private party
- adequate standards to guide the discretion of the private parties
- participation in decisions or retention of review authority by a public agency or officer
- clarity concerning the role of the private party in exercising delegated power

3. Teachers' Interests and Collective Bargaining

a. In General

Teachers' unions are one type of private organization which has sought to have greater discretion delegated by school boards. As a result, the judicial view of teachers' interests and board powers in collective bargaining is closely related, and perhaps analagous to, the delegation to local boards for decentralization purposes.

Even normally restrictive state courts have permitted a measure of discretion to be delegated through collective bargaining agreements with such unions in the absence of statutory authority.[253] These courts in sustaining collective

253/ See e.g., Norwalk Teachers' Ass'n. v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Illinois Education Ass'n. v. Board of Educ. of School Dist. No. 218, 23 Ill App. 3d 649, 320 N.E. 2d 240 (1st Dist. 1974); Louisiana Teachers' Ass'n. v. Orleans Parish School Board, 303 So. 2d 554 (La. Ct. App. 1974); Elec. Workers v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965); North Royalton Ed. Ass'n. v. North Royalton Bd. of Ed., 325 N.E.2d 901 (Ohio App. Ct. (1974)). Some other courts continue to (footnote cont'd. bottom of page 110).

bargaining have taken the position that no unlawful delegation of board discretion was involved because "authority is and remains in the board."[254] The board retained the "right of final decision as to what terms and conditions it would agree to" including the right not to agree[255] and judicial review was available to challenge any alleged unlawful exercise of authority.[256]

These decisions have permitted collective bargaining agreements to limit board discretion by requiring that certain procedures be followed prior to the board making a decision on personnel matters[257] and by authorizing delegations to third party arbitrators in the event of disagreements.[258]

253/ hold that teacher collective bargaining without statutory authority constitutes an unlawful delegation of board discretion. See e.g., Board of Educ. v. Scottsdale Education Ass'n., 17 Ariz. App. 504, 498 P.2d 578 (1972); Chatham Ass'n. of Ed., Teach. U. v. Board of Public Ed., 231 Ga. 806, 204 S.E.2d 138 (1974).

254/ Norwalk Teachers Assoc. v. Board of Education, supra 83 A.2d at 482.

255/ Louisiana Teachers' Ass'n v. Orleans Parish School Board, supra 303 So.2d at 567.

256/ North Royalton Education Ass'n. v. North Royalton Bd. of Educ., supra, 325 N.E.2d at 908.

257/ Classroom Teachers Association v. Bd. of Education, 15 Ill. App. 3d 224, 304 N.E.2d 516 (3d Dist. 1973); Illinois Education Association v. Board of Education of School District No. 218, supra; contra Wesclin Education Association v. Board of Education, 30 Ill. App. 3d 67, 331 N.E. 2d 335 (5th Dist. 1975).

258/ See e.g., North Royalton Education Ass'n. v. North Royalton Bd. of Ed., supra (binding arbitration of grievances); Board of Education v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1st Dist. 1974) (arbitration of "minor disputes" permitted); contra Lockport A. Sp. Ed. Coop v. Lockport A. Sp. Ed. Coop A., 33 Ill. App. 3d 789, 338 N.E.2d 463 (3d Dist. 1975).

While permitting such limitations, these state cases all take the position, however, that boards cannot delegate discretion concerning basic educational policy through collective bargaining.[259] Nevertheless, to accommodate the special interests of teachers in the terms and conditions of their employment, courts have increasingly come to view limitations on school board discretion in these areas as not amounting to unlawful delegation.

For example, in states with collective bargaining legislation that ostensibly denies collective bargaining over basic educational policies, state courts have in fact interpreted phrases such as "terms and conditions" to permit bargaining over major issues of educational policy. Thus, state court decisions have found the mandatory scope of collective bargaining to include the number of teachers hired and the functions of substitute teachers;[260] staff size;[261] class size and teacher loads;[262] notice of termination and tenure;[263] the school

259/ See, e.g., North Royalton Education Ass'n. v. North Royalton Bd. of Ed., supra.

260/ Detroit Federation of Teachers Local 231, AFT, AFL-CIO v. Board of Ed. of School Dist. of City of Detroit, 50 Mich. App. 660, 213 N.W. 2d 839 (1973).

261/ Susquehanna Va. Cent. School Dist. at Conklin v. Susquehanna Val. Teachers Ass'n., 358 N.Y.S. 2d 235 (N.Y.A.D. 1974).

262/ West Hartford Education Assoc. v. Decourcy, 162 Conn. 566, 292 A.2d 526 (1972)

263/ Board of Ed. Central School Dist., Harrison v. Harrison Ass'n. of Teachers, 306 N.Y.S. 2d 49 (N.Y.A.D. 1974).

calendar;[264] and job related personal property damage, partial reimbursement for approved graduate courses, and arbitration of disputes regarding disciplinary action taken against tenured teachers.[265]

b. Collective Bargaining in the District of Columbia

The Board, through an agreement with the union representing D.C. teachers[266] follows the established pattern of collective bargaining resulting in substantial incursions into Board policy discretion. The contract limits Board discretion by specifying class size;[267] the length of the school day;[268] the procedure and criteria for making program assignments to teachers;[269]

264/ Joint School Dist. No. 8 v. Wisconsin Employment Relations Bd., 37 Wis. 2d 483, ___ N.W. 2d 78 (1967).

265/ Board of Education of Union Free School District No. 3 v. Associated Teachers of Huntington, Inc., 30 N.Y. 2d 122, 282 N.E. 2d 109, 331 N.Y.S. 2d 17 (1972).

266/ Agreement between the Board of Education and the Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO, October 26, 1976 - January 25, 1978.

267/ Art. XXV. A.7.

268/ Art. XXV. A.2.a.

269/ Art. XXV. A.8.

the educational programs and facilities which the Board will provide;[270] the auxiliary and ancillary services that the Board should provide;[271] the support services the Board will provide to certain children;[272] the criteria for offering courses;[273] criteria and procedures to teacher transfers;[274] criteria and procedures for teacher evaluation;[275] the procedure for student discipline;[276] the procedure for grading students;[277] and restrictions on school building communications systems.[278] The agreement also establishes a number of joint Board-union advisory committees,[279] whose recommendations are to be made to the Board. Employee grievances concerning the interpretation

270/ Art. XXV. C.3.,4. D.2.

271/ Art. XXV. E.

272/ Art. XXV. E.4., 5., 6., 7.

273/ Art. XXV. A.13.a.

274/ Art. IV.

275/ Art. XVII.

276/ Art. XX.

277/ Art. XXI.

278/ Art. XXIII. B.

279/ Art. II. 13.

or application of the terms of the agreement can, at the option of the union, be submitted to binding arbitration.[280] Moreover, the agreement is intended to supersede all Board rules with which it is inconsistent.[281]

While Board rules purport to reserve large areas of educational policy for Board discretion,[282] in fact as the above list of requirements shows, the agreement substantially restricts Board discretion in a number of important areas of educational policy.[283]

280/ Art. VI. B.2.a. Step 4.

281/ The effect of this provision may be subject to challenge since the D.C. Administrative Procedures Act requires compliance with the rule-making procedures established in the Act. The contract was not adopted in accordance with these procedures.

282/ Board Rules, Ch. XVIII. Labor Relations (Nov. 6, 1975) The agreement resulting from the good faith bargaining is "limited to conditions of employment" (§7.1); and the obligation to meet and confer is not to include "functions and programs of the Board, standards of services, the school budgets, utilization of technology, the organizational structure, or the selection and direction of personnel, provided that issues pertaining to the implementation of decisions of the Board which impact upon working conditions of employees may be within the scope of collective bargaining" (§7.2).

283/ A law review article, after reading a similar list of areas subject to collective bargaining, concluded that "[i]t would be dishonest to insist that contracts in which the above-mentioned items are considered bargainable do not constitute an impairment of the board of education's discretion." 57 Geo. L. J., supra note 37 at 1007.

c. Summary

It is clear that the interests of teachers in their employment relationship and the assumption that they desire to improve the educational system have been the basis for substantially limiting and effectively delegating the policy-making authority of school boards through collective bargaining -- irrespective of the verbiage to the contrary. And courts increasingly recognize that teachers' legitimate concerns about wages and conditions of employment cannot be neatly isolated from the educational prerogatives of school boards.[284] Furthermore, the actual practice of collective bargaining with teachers by the Board is entirely consistent with this view.

284/ See cases cited notes 260-265 supra.

4. Parental Interests in the Education of Their Children

a. Introduction

The court's solicitude for the interests of teachers, discussed in the previous section, is of recent vintage. Judicial recognition of the special interest parents have in the education of their children has far deeper roots going back to common law:

> At common law, the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. 285/

Neither the passage of time, nor the rise of statewide school systems and compulsory education legislation have obviated the "natural rights" of parents to the care, control, and custody of their children. Rather, faced with these and other circumstances, courts have determined that state and parental interests in the child are concurrent and supportive.

b. Judicial Recognition of Parental Interests

In Meyer v. Nebraska, 286/ the Supreme Court first discussed the nature of the parental interest in the education of children. The Court found that education was an "essential" right and duty of parents with respect to their children, and thus fell within the ambit of protected Fourteenth Amendment liberties. Based upon this finding, the Court struck down as unconstitutional a state law which prohibited foreign language instruction in elementary schools.

285/ Lewis' Blackstone Sec. 447.

286/ 262 U.S. 390 (1923).

However, the Meyer Court also noted that the parental interest in education was not inconsistent with the state interest in compulsory school attendance and "reasonable regulations for all schools", observing:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted.... Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws. 287/

Accordingly, the state education system was considered to be in furtherance of parental interests, so long as its requirements remained "reasonable."

The Supreme Court has further defined the parental interest in education of children in Pierce v. Society of Sisters. 288/ In Pierce, the Court held unconstitutional a state statute which required public school attendance for all children, finding that the reasonable state interest in education did not extend that far in view of parental rights. The Court explained:

> ....we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control..... The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 289/

287/ 262 U.S. at 400.

288/ 268 U.S. 510 (1925).

289/ 268 U.S. at 534-535.

In subsequent cases, the Court has reaffirmed the parental interest in upbringing and education of children,[290] while simultaneously recognizing the state ability to regulate education where there is a reasonable and proper state interest. Where state and parental interests conflict, the Court has indicated that "[i]t is cardinal that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[291]

For example, in Farrington v. Tokushige, the Supreme Court struck down an act of the legislature of the Hawaii Territory which prescribed rules of conduct for private "foreign language schools" attended primarily by Japanese-American children. The rules extended to teacher qualifications, textbook content, and required that teachers pledge to "direct the mind and studies of pupils in such schools as will tend to make them good and loyal American citizens...."[292] The Court found that the rules gave "affirmative direction concerning the intimate and essential details of such school.... [denying] owners and patrons reasonable

290/ Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1971); Prince v. Massachusetts, 321 U.S. 158 (1944); West Virginia v. Barnette, 319 U.S. 624 (1943); Farrington v. Tokushige, 273 U.S. 284 (1927).

291/ 321 U.S. at 166.

292/ 273 U.S. at 293-94.

choice and discretion in respect of teachers, curriculum, and textbooks."[293] Similarly, in West Virginia v. Barnette,[294] the Court has ruled in favor of parents who objected on religious grounds to a mandatory flag salute and pledge in their children's schools. And in Wisconsin v. Yoder,[295] the Court granted Amish parents an exemption from compulsory high school attendance based upon their religious/cultural tradition, at least partially in consideration of their constitutional rights as parents:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[296]

In Yoder also, the Court delineated the boundaries of the "reasonable" state interest in education, indicating that state limitation of parental rights is proper "if it appears that parental decisions will jeopardize the health and safety of the child, or have a potential for significant social burdens."[297]

Lower court cases have generally followed and elaborated upon the Supreme Court view of parental rights in education. In early cases

293/ Id. at 298.

294/ 319 U.S. 624 (1943).

295/ 406 U.S. 205.

296/ 406 U.S. at 232.

297/ 406 U.S. at 233-34.

involving parental selection of curriculum for their children, the courts consistently upheld the parent's right of choice.[298] The decision in one such case is indicative of the others, detailing particular rights which are "parental" in contrast to those which belong to the state.

> At common law the parent, and especially the father, was vested with supreme control over the child, including its education, and, except where modified by statute, that authority still exists in the parent.... The school authorities of the state have the power to classify and grade the scholars in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and textbooks for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.[299]

More recent cases involving disputes between parent and state over the compulsory education of children have generally been consistent

298/ See e.g., People v. Stanley, 255 P. 610 (Colo. 1927); Hardwick v. Board of School Trustees, 205 P. 49 (Cal. App. 1921); State v. Ferguson, 144 N.W. 1039 (Neb. 1914); School Board v. Thompson, 103 P. 578 (Okla. 1909); State v. School District No. 1 of Dixon County, 48 N.W. 393 (Neb. 1891).

299/ School Board v. Thompson, supra 103 P. 579, 582.

with the cases discussed previously. In Sheppard v. State,[300] the court approvingly cited the School Board v. Thompson proposition concerning the responsibility of parents for the education of their children. Primarily because of this responsibility, the court could find no violation of compulsory attendance laws from the mere fact that defendants' children were not attending a public or a private school. Nevertheless, such a violation would be found where parents were not meeting the general educational requirements properly imposed by the state.[301]

Two cases dealing with the subject of sex education clarify further aspects of parental rights in the education of children. In the first, Ohio v. McLaughlin,[302] charges of contributing to the delinquency of a minor were levied against a mother who gave birth control information and devices to her daughter. Finding for the mother, the court observed that sex education was both the right and the duty of a parent. However, in the second case, Cornwell v. State Board of Education,[303] the court rejected parents' contention of an "exclusive constitutional right to teach

300/ 306 P.2d 346 (Okla. App. 1957).

301/ See also People v. Levisen, 90 N.E.2d 213 (Ill. Sup. Ct. 1950). Some courts have struck down education in the home for failure to meet state standards. See e.g., Shoreline School Distr. v. Supreme Court, 346 P.2d 999 (Wash. 1960), cert. denied 363 U.S. 814; Knox v. O'Brien, 72 A.2d 389 (N.J. 1950); People v. Turner, 263 P.2d 685 (Ca. 1953).

302/ 212 N.E.2d 635 (Ohio App. 1965).

303/ 314 F. Supp. 349 (D. La. (1970) aff'd 428 F.2d 471 (4th Cir. 1970), cert. denied 400 U.S. 942 (1970). See also Medeiros v. Kiyosaki, 478 P.2d 314 (Haw. 1970).

their children about sexual matters in their own homes," instead finding sex education in the schools to be proper. The two cases read together underline both the importance of the parental right to educate children and the concurrent nature of parental and state interests. Nevertheless, in keeping with earlier cases involving the parental right to select curriculum for children, sex education cannot be made compulsory as to a particular child over a parent's objection.[304]

Similarly, in Glaser v. Marietta,[305] a federal court upheld the right of a parent to forbid school authorities from using corporal punishment on his or her child. Because the school could not demonstrate that these parental wishes would jeopardize the health or safety of the child, or have a potential for significant social burdens (the test set out in Yoder), the parental interest in education was deemed to be controlling.

Lower court decisions concerning child custody have also dealt with the parental right to educate children.[306] In Sinquefield v. Valentine,[307] the court noted that the constitutional right of parents to educate their children "involves the power to give to children such training and education

304/ See Valent v. N.J. State Bd. of Educ., 274 A.2d 832 (N.J. 1971).

305/ 351 F. Supp. 555 (W.D. Pa. 1972); contra (pre-Yoder), Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971).

306/ See e.g., Conley v. Walden, 533 P.2d 955 (Mont. 1975); In Re Dobbs Adoption, 531 P.2d 303 (Wash. App. 1975); In Re Guardianship of Faust, 123 So.2d 218 (Miss. 1960); Odell v. Lutz, 177 P.2d 628 (Cal. App. 1947); Sinquefield v. Valentine, 132 So. 81 (Miss. 1931); Denton v. James, 193 P. 307 (Kan. 1920); Heber v. Drake, 118 N.E. 864 (Ind. App. 1918); Re Knott, 197 S.W. 1097 (Tenn. 1917).

307/ 132 So. 81 (Miss. 1931).

as in the parent's judgment is best for the child, so long as such training and education do not result in, or tend to develop, tendencies or traits dangerous to our society." More recently this same view has been reiterated by the court in In Re Guardianship of Faust. Absent unfitness or misconduct, therefore, a parent has the authority to control the education of children in his/her custody.[308] Unfitness, misconduct, or neglect on the part of parents are proper areas for reasonable state regulation, since they relate both to the welfare of the child and to the welfare of society;[309] the parent's natural rights of control, care, and custody may constitutionally be denied for these reasons, provided due process is satisfied.[310]

c. Summary

As the preceding discussion indicates, the interest of parents in the education of children has been viewed by the courts as a natural right and duty worthy of constitutional protection. The state interest in the education of children, while concurrent with that of parents, is limited to reasonable regulation within the competency of the state, viz. the

308/ See e.g., Rhoades v. Rhoades, 535 P.2d 1122 (Colo. 1975); Mester v. Mester, 296 N.Y.S. 2d 193 (N.Y. 1969); Bateman v. Bateman, 159 S.E. 2d 387 (Ga. 1968); Jackson v. Fitzgerald, 185 A.2d 724 (D.C. App. 1962); In Re Guardianship of Faust, 123 So.2d 218 (Miss. 1960); In Re Stuart, 114 F.2d 825 (D.C. Cir. 1940).

309/ See Stubbs v. Hammond, 135 N.W. 2d 540 (Iowa 1965).

310/ See Stanley v. Illinois, 405 U.S. 645 (1971); Sheldon v. Sheldon, 289 P.2d 335 (Wash. 1955); Sinquefield v. Valentine, 132 So. 81 (Miss. 1931); Lacher v. Venus, 188 N.W. 613 (Wisc. 1922); Re Knott, 197 S.W. 1097 (Tenn. 1917).

health and safety of the child and the avoidance of significant social burdens. Both federal and municipal courts in the District of Columbia have lent their support to these propositions.[311] Delegation of responsibilities by the Board to parent controlled local boards could properly be seen as a recognition of the constitutionally protected interests of parents in the education of their children. Moreover, such delegation would merge the concurrent state and parental interests in education rather than present a conflict between them, by instituting reasonable state regulation in furtherance of natural parental rights.

311 / See e.g., In Re Stuart, 114 F.2d 825 (D.C. Cir. 1940); Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967); In the Matter of C.A.P., 356 A.2d 335 (D.C. App. 1976); In the Matter of N.M.S., 347 A.2d 924 (D.C. App. 1975); Jackson v. Fitzgerald, 185 A.2d 724 (D.C. App. 1962).

5. Structuring Decentralization Through Local Boards

a. Introduction

Previous sections have explored the general legal principles which would likely be applied to decentralization in the D.C. schools. The discussion below suggests ways in which the Board can maximize the possibility that the role of local boards or staff in decentralization will be upheld by the courts. Since the precise legal doctrines that D.C. courts would apply remains uncertain, conformity to the legal principles considered in this analysis obviously provides no guarantee of insulation from successful challenge. But conscious regard for standards applied in analogous situations enhances the possibility that delegation of functions of local boards would survive a challenge.

b. The Composition of Local Boards

Parents have constitutionally protected interests in the education of their children. The inclusion of substantial parent representation on local boards could be viewed as Board recognition of these interests. Delegation of some discretion to local boards would then be a recognition of Board and parental concurrent responsibility for education. Delegation so framed could help to eliminate an important, yet intangible, factor in delegation cases -- the courts' distrust of the body or person exercising delegated power -- and provide the legal foundation for substantial delegation.

While parents probably can make the strongest case for delegation, the inclusion of other citizens on local boards can be justified. One of the fears which courts reflect in delegation issues concern the exercise

of governmental authority by democratically unaccountable bodies and officials. Insofar as local boards are elected from geographical neighborhoods this objection is met.[312] Furthermore, parents and citizens in general reflect a great diversity of views, consistent with the interests of school children, unlike private groups whose narrower views may give rise to conflicts of interests.[313]

c. The Interests Served by Decentralization Through Local Boards

Delegation and subdelegation decisions have typically pointed to the necessity for delegation or as a reason for sustaining it.[314] Consequently, it is important that the need for delegation to local boards be made explicit.

The previous section spelled out several reasons for local board participation: to recognize the constitutional interests of parents, provide greater citizen input, and increase the schools' responsiveness to needs of individual children.

312/ See 57 Geo. L. J., supra note 37 at 1009, 1012.

313/ For example, delegation through collective bargaining to teachers' unions, which reflect concepts of "labor solidarity," has greater potential for conflicts of interest than delegations to parents and citizens.

314/ See pp. 76-78 supra.

The size and complexity of the agency and number of decisions which the Board would be required to make if these were not delegated, the need for the Board to concentrate on general policy for application by others, the need to make decisions on a recurring basis to meet changing conditions, the need to deal flexibly with a multitude of unique situations have been seen as substantial reasons for delegation.[315] To the extent that specific educational techniques have not been shown demonstrably more effective than others, a substantial reason for decentralization could also be the interest in encouraging experimentation, innovation and educational programs which local schools feel best meet their needs. If the Board is explicit about the areas in which it wishes to promote or permit diversity, and the reasons for this, and delegates responsiblity in such areas to local boards, the chances of such delegation being approved are enhanced.

In any rules or contracts pertaining to local boards the Board should be as explicit as possible concerning the need for delegation. Delegation which appears to be the result of a well reasoned policy decision is more likely to be viewed as within the Board's policy-making discretion.

315/ See pp. 63, 84-85 supra.

d. The Interests Affected by Delegation

Courts have been sensitive to the interests affected by delegated decisions.[316] While no simple rule can be stated, in general it can be said that the more important the interests affected, the greater the safeguards necessary to prevent arbitrary action. This principle is simply a corollary of traditional due process concepts to which local boards and the central Board would be subject in their dealings with teachers, staff and students. Additionally, however, when constitutional rights of teachers and students are at stake, the Board should insure that local board discretion is confined by standards that are as specific as possible and that the role of local boards in such matters and procedures to be followed are precisely delineated. Indeed, a court might conclude that Congress, absent specific authorization, did not intend that decisions affecting important constitutional interests, e.g., concerning the termination of a tenured teacher, be substantially delegated to local boards -- even though with respect to other decisions the court may presume that the lack of specific authorization to delegate is no bar to delegation.[317]

316/ See discussion pp. 78-79, 99-109, 116-124 supra.

317/ See cases cited notes 183-184 supra.

This does not mean that local boards must be excluded from participation in such decisions; rather, to avoid the likelihood of successful challenge, the Board, if it now makes such decisions, would be well advised to continue to do so, while structuring the local boards' role as one of making recommendations.[318]

The Board must also take precautions to insure that general constitutional and other legal obligations are followed by local boards. For example, local boards must avoid racial, religious and sexual discrimination;[319] they may not assign pupils to instructional "tracks" in an unconstitutional manner.[320] Of course, the Board today must ensure that its employees comply with such requirements. However, because in decentralization more people will be involved in making decisions, and further because new local board members are likely to be less familiar with legal constraints than regular professional staff, there is greater need for

318/ Specific suggestions concerning how this might be done in areas such as personnel are discussed in Part II.

319/ The interaction of the constitutional obligation to avoid racial discrimination and decentralization to local boards has been discussed in Kirp, Community Control, Public Policy and the Limits of Law 68 Mich. L. Rev. 1355 (1970) and Dimond, Reform of the Government of Education: A Resolution of the Conflict Between "Integration" and "Community Control" 16 Wayne L. Rev. 1005 (1970).

320/ Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); aff'd sub nom Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

specific written standards to guide the actions of local boards in such areas. In matters involving no constitutional interests or less significant ones, courts will likely be more willing to consider the specific interests served by delegation, including the interests in parental choice and diversity. For example a court is likely to take a more favorable view of local board discretion to determine which teachers among a pool of eligibles should be selected than in the termination of a teacher for cause. The two decisions are substantially different both in terms of the interests in diversity and choice served and the constitutional rights of teachers affected. These issues are further discussed in the context of particular functions in Part Two.

e. The Extent of Delegation to Local Boards.

The extent or degree of delegation has been of central concern in many of the cases we have reviewed. As has been discussed, no fixed standard concerning the extent of delegation can be articulated.[321] The greater the need for delegation the more likely extensive delegation will be permitted and if the delegating body is considered to exercise legislative powers, greater delegation may be permitted since courts often presume a need for delegation by legislative bodies. Courts are also more likely

321/ See pp. 73-75 supra.

to sustain the delegation of discretion when the delegating body retains ultimate control over the actions of the delegatee. Such control can take the form of confining the scope of discretion by standards for its exercise, subjecting delegation to review or requiring other procedural safeguards. Indeed, delegated decisions approved by the delegating body will probably be considered recommendations not raising delegation issues. 322/ It is clear, however, that the Board cannot completely alienate its authority over educational policy - although courts have permitted boards of education to give up completely their discretion concerning certain matters of educational policy for a limited period through collective bargaining with teachers' unions -- apparently in recognition of the interests of teachers in such issues.

An issue which should be highly relevant to the permitted scope of delegation is the extent to which the matters delegated to local boards were actually considered by the Board prior to the delegation. Many decisions are now undoubtedly made by Board staff without Board review. Such decisions have already been delegated, and this delegation may now be so established by long customary practice that day to day Board involvement in such matters would be viewed as impractical or even absurd.

322/ See pp. 83-84 supra.

Participation of local boards in decisions long delegated by the Board should raise fewer legal questions than delegation of matters which the Board now decides. In such instances, Board delegation would probably be an accepted fact. The major issues for conferral of authority over such matters on local boards would be the extent to which local boards are subject to Board authority and the presence of standards and perhaps other safeguards to avoid arbitrary action where sensitive rights are at stake.

f. Ensuring Board Control of Local Boards

(i) Board rules in general

Retention of Board control and oversight over local boards is not difficult to structure. Local boards are wholly the creatures of the central Board. The Board can specify their composition and method of selection. They can be made subject to Board rules,[323] which may, among other things, establish the basic educational policies which local boards are to follow. The Board can choose to make certain local board decisions subject to Board review either automatically or upon the request of an affected party. The Board can specify the local board's relationship to school staff. While there may be no employment relationship between the Board and local board members, they are as subject to Board control as employees. In short, if the Board retains sufficient control over local

323/ See, e.g., the Board's agreement with the Morgan Community School Board, pp. 11-14 supra.

boards, they should be considered subordinates or instrumentalities of the Board used to implement Board policy.[324]

The Board may also be able to reinforce its showing that it has retained control through the use of less formal techniques. For example, the designation of certain Board personnel as liason staff to work with local boards could help to ensure conformity to Board rules, as could training sessions for local board members.

(ii) creation of an employment relationship

Another method of ensuring effective Board control over local boards is for local board members to be made employees of the Board. The Board is not prohibited from appointing temporary employees for positions not covered by Title 31, Chapter 15.[325]

324/ The Board's ability to control local boards can be contrasted with its ability to control, for example, a teachers union, a private organization whose selection procedures, internal operations and objectives are beyond direct Board control. While teachers are employed by the Board, it is precisely those issues generated by the employment relationship which create the potential for conflicts of interest.

325/ While under Title 31, Chapter 15 of the Code the creation of new categories of professional employees requires the concurrence of the Council, (Code §31-1522) the Board can still appoint temporary professional employees on the recommendation of the superintendent (Code §31-1534). Section 31-1522(b) requires Council concurrence for classification of professional positions requiring at least a bachelor's degree. While this might be construed to require any person involved in the administration of the schools to have a bachelor's degree, it is unlikely that at the time this was enacted Congress had in mind prohibiting the creation of an employment relationship with non-professional parent and other citizen members of local boards. Rather, it appears to reflect Congressional interest in assuring the competence of professional staff.

Precedent for such an employment relationship already exists in the District. The order establishing the District of Columbia labor relations board makes the members of the labor relations boards "intermittent employees." 326/ The creation of an employment relationship with local board members would confirm Board control over local boards. It would also eliminate dispute about how local boards should be characterized and bring them clearly within sub-delegation doctrines which have been developed largely in the context of transmissions of authority from agency heads to subordinate employees.

(iii) contracting with local boards

Another method of delineating local board authority and assuring central Board control is by contract between the Board and local boards. Board rules pertaining to local boards can serve many of the same functions, but a contract has the advantage of memorializing the relationship between the Board and a particular local board in a way that more impersonal Board rules cannot, thereby enhancing accountability. Specifying local board functions, limitations and responsibilities by contract would also help to clarify local board authority for the public. 327/ In addition, a contract lays the foundation for a stable relationship between

326/ Organization Order No. 25, Commissioners' Order No. 70-229 (June 19, 1970), Part IV.

327/ We agree with the opinion of the Board's General Counsel concerning the importance that the public be able to determine what local board responsibilities are.

the Board, school staff and local boards. Because its provisions govern this relationship, the parties may be more likely to come to agreement at the outset on issues which might otherwise remain unconsidered until problems arise. The fact that a contract would be for a definite period may also help to lay to rest certain issues until renewal is considered -- even where the Board reserves the right to modify the contract during its term.

The discussion of contracts arising out of school board collective bargaining with teachers unions has shown that courts increasingly have accepted substantial limitations on Board discretion through such contracts.[328] And the Board itself has established such precedent by substantially foreclosing discretion over certain matters of educational policy through its collective bargaining agreement with the teachers' union. Moreover, the Board's present contracts with three local boards, although never challenged as to their legality, would appear to provide an additional basis for the reasonableness of the contractual approach.[329]

One advantage of a contract is its limited duration. Its limited time period enhances the position that the extent of delegation is limited

328/ See discussion pp. 109-115 supra. The issue of decentralization by contract with local board has been extensively discussed in 57 Geo. L. J. 992, supra note 37 at 1002-1013.

329/ See discussion pp. 11-15 supra. Insofar as contemporaneous practice is a guide to legislative intent it is also significant that all three of these agreements were in effect in 1973 when Congress enacted the Self-Government Act.

and the Board has not alienated its ultimate control. Obviously the shorter the time period, the stronger this argument is.[330/]

By contract (as well as in any other method of decentralization) the Board must retain ultimate authority for educational policy. The limited time period of the contract alone may be sufficient to show Board retention of ultimate control, even where the Board does not retain the authority to modify the contract with the local board during its term. Indeed, the terms of school board contracts with teachers unions that take from boards substantial discretion over educational policy affecting teachers' interests and supersede Board rules to the contrary,[331/] are often viewed as binding during the term of the contract.[332/] These cases more likely stand for the proposition that limited areas of discretion can be completely delegated for the contract period, rather than the Board can delegate its ultimate authority over educational policy. However, it would also appear that to the extent the Board is viewed as exercising powers of a legislative nature,[333/] the more likely substantial delegation will be sustained. Yet the

330/ An opinion of the Board's General Counsel indicated that the five year period of the contract with the Morgan Community School Board was probably too long. We are not sure about how this would be resolved since, in our opinion, the duration of the contract would be but one fact a court is likely to consider to judge the legality of decentralization. However, it is safe to say that contracts of the duration of those with employees unions (one to three years) would stand on a firmer footing, all else being equal.

331/ See note 281 supra.

332/ See discussion pp. 109-115 supra.

333/ See discussion pp. 28-53, 61-69 supra.

Board would be on firmer ground if it made contracts with local boards subject to later formed Board judgments concerning educational policy. This could be accomplished by the Board reserving the right to modify the contract subject to Board rules.[334]

(iv) delegating the authority to recommend

In a number of cases courts have considered private groups and employees as serving in an advisory capacity when they recommend decisions to agency heads.[335] Generally, if the agency head makes the

334/ The Board's present agreements with local boards are subject to Board rules, including those later issued. A Georgetown Law Journal article takes the position that the Board must retain the power to sever the contract, see supra. note 37 at 1012. However, in making this statement, the article did not distinguish between several issues we believe important. First, even if the Board were required to retain the power to sever, the contract could still specify reasonable criteria and procedures for doing so (union contracts with boards frequently place conditions precedent on board action. See pp. 110-111 supra.). Second, the Board should be able to retain ultimate control over educational policy by reserving the authority to modify the extent of and criteria for the exercise of local board discretion -- without the need to retain the power to eliminate local boards, as such, during the contract period. This is particularly the case if the Board ensures the integrity of local board action by retaining the power to remove individual members of local boards for cause, and by retaining the right to review local board decisions.

335/ See cases cited notes 200, 213, 231. See also 57 Georgetown L. J. 993, 997-998 supra note 37.

final decision, even though that decision is based on a recommendation, no problems of delegation or subdelegation are created -- the agency head remains in a position to accept or reject the advice, and by accepting it, the decision becomes that of the head.

The advisory body - recommendation standard can be of significant use in fashioning a role for local boards in decisions which are explicitly consigned to the Board by the Code. By contract and/or rule the Board can establish procedures for obtaining recommendations on such matters from local boards. Furthermore, local boards can play a substantial role in gathering, reviewing and appraising information, including participation in hearings or other fact gathering procedures, so long as the decisions which local boards recommend are approved by the Board.

The role of local boards in decisions which the Board must make is further discussed in Part Two where specific functions are considered.

D. Decentralization Involving Board Employees

1. Introduction

This section is primarily concerned with decentralization that would increase the discretion of local staffs, especially principals and regional administrators. Transmitting additional authority to these Board employees raises most of the issues considered in the discussion of local boards and the delegation and subdelegation cases -- except, of course, those issues relating to the characterization of local boards. Furthermore, most of the cases, particularly those pertaining to subdelegation, have involved employees. Consequently, these issues will not be treated separately here. The primary focus of this discussion is the extent to which subdelegation to principals and regional administrators has been legally recognized in D.C.

2. Principals

A provision of the D.C. Code enacted in 1906 clearly indicated the intent of Congress that substantial authority be delegated by the Board to principals:

> Principals of normal, high, and manual training schools shall each have entire control of his school, both executive and educational, subject only in authority to the superintendent of schools for the white schools and to the colored assistant superintendent for the colored schools, to whom in each case he shall be directly responsible. (emphasis added)336/

This provision can be viewed as an authorization, or perhaps a command, for the Board to confer substantial discretion on school principals so that

336/ Code Sec. 31-115 (1973). This section was repealed by the Ethnic Reference Repeal Act. D.C. Law No. 1-26 (1975).

the principals will have the "entire control" of their schools' "executive and educational" functions. Although the language of §31-115 explicitly reflects pre-1954 racial segregation and has been repealed, it does show a clear intent to permit substantial delegation to principals.

3. Regional Administrators

No express statutory authorization exists for subdelegation to regional administrators. However, this does not mean that such subdelegation is subject to serious challenge. The Board with the concurrence of the Council has authority to establish new employment classifications.[337] On December 17, 1974, the Council approved the creation of six regional superintendents to "develop and implement educational programs and services for all public schools."

Furthermore, prior to the creation of regional superintendents, Board rules delegated a substantial amount of discretionary authority to other deputy and assistant superintendents.[338]

337/ Code, §31-1522.

338/ See, e.g., Board Rules; Chap. III §4-11.

4. General Considerations

Insofar as the Board subdelegates functions to regional administrators or principals that were formally delegated to central administrative staff, other than those specifically vested in the superintendent by the Code, few legal problems would appear to arise. Such a transfer of authority could be characterized as the Board merely relocating authority which had previously been subdelegated to central office employees. In one respect, however, the issues of the extent of delegation and retention of ultimate Board control may be more pressing for transmission of authority to employees than to local boards. Congress clearly intended citizen control of education by the establishment of an elected Board of Education. Delegation to local boards, made up of parents and other citizens can be viewed as furthering this intent more than delegation to local and regional employees.[339]

The exercise of substantial discretion by Board employees, of course, has the support of necessity and long established practice.[340] We do not know precisely how these factors would be weighed, but

339/ However, a countervailing practical argument is that granting additional discretion to principals and other subordinate administrators can help to pinpoint responsibility and make the educational system more responsive to parent and citizen concerns.

340/ See discussion pp. 9-10 supra.

decentralization which combined a substantial role for local boards and increased discretion to local staff would merge these interests and in some measure replicate the existing relationship between the Board and the staff of the central administrative office.

PART TWO: ISSUES RELATING TO THE DECENTRALIZATION OF PARTICULAR FUNCTIONS

A. Introduction

Part One of this analysis has described the general legal principles relating to Board decentralization through delegation to local boards or staff. Our analysis of this general legal framework has resulted in the identification of factors which, if present, make it less likely that a court might find an invalid delegation. Based on this analysis, we have concluded that any written delegation of authority from the Board to a local board or staff should incorporate the following:

- an express statement that the Board retains all rights, powers, authority, duties and responsibilities for educational control and functions.
- an express statement that the Board retains the right to revoke the delegated grant of authority.
- a clear statement of the necessity for and the interests served by the grant of authority.
- an express statement of the role and scope of authority of the local board or staff, including a provision for discretionary Board review.
- adequate standards and procedures to guide the discretion of subordinates and local boards and provide safeguards against arbitrary action.

This general recommendation has applicability to any Board delegation under the present legal structure. However, the decentralization of certain functions may nevertheless raise additional and more specific issues which relate directly to the legal requirements for particular functions.

Therefore, in this part of the analysis, we will consider issues relating to decentralization of particular functions. We have focused our consideration on several key areas -- budget, personnel, curriculum and textbooks, the non-school use of school buildings, building maintenance and supplies and equipment.

For each of these functions, any specific statutory limitations on the Board's power to delegate that function will be described. Such limitations can take several possible forms. In some instances, the Board itself may be required to make a particular decision. In other cases, the Board may share power over a particular function with another agency of the D.C. government. In a third situation, control over a function may be completely out of the Board's hands. Limitations of this sort are of obvious importance: before it may delegate authority, the Board must first have that authority to delegate. Another set of limitations will also be described. These are limitations pertaining to particular functions which do not prevent delegation as such, but do restrict the exercise of discretion concerning that function, e.g., procedural requirements concerning personnel actions, or requirements that certain resources be distributed equally.

These limitations are found in four general sources: the Code; contracts between the Board and employees' unions; court decrees; and statutes and regulations governing federal education programs in which the Board participates. In the latter category, we analyze only the largest

federal program, Title I of the Elementary and Secondary Education Act of 1965, as amended.[341]

However, this analysis will not consider present Board rules, either as a limitation on the power to delegate, or as a limitation on the exercise of decentralized authority. While the Board is bound to follow the rules currently in effect, it can amend them unless they reflect a limitation found in one of the above mentioned sources. Thus, to the extent present Board rules prevent decentralization, it is within the Board's power to change them.

Based on the anlysis in Part One, we are of the opinion that none of these limitations completely prevents delegation of some responsibility to local boards and local staff for each of the functions considered here. They do, however, determine the degree of delegation likely to be found legally permissible. For example, even when the Board itself is required to make a particular decision, local boards or staff may still have a substantial role in gathering and reviewing information and making recommendations. A similar role may be fashioned even if another D.C. agency has control of a function -- although here the Board itself would make the final recommendations to the other agency. Thus, a primary focus in this analysis is on what degree of delegation is consistent with the limitations applicable to a particular function. Where appropriate,

341/ 20 U.S.C. 241a et seq.

delegation alternatives will be illustrated by drawing upon decentralization which has actually been practiced in the D.C. schools.

B. Decentralizing the Budgeting Process

1. Introduction

The budgeting process determines in general the types of resources which will be available in a school. As a result, it is clearly a function of some importance in considering decentralization.

2. Limitations on Board Authority to Delegate Budgeting

Under the budgetary process established in the Self-Government Act, the Board submits its annual budget to the Mayor for review and inclusion in the overall budget for the District, which the Mayor in turn submits to the Council for adoption.[342] After adoption by the Council, the Mayor submits the approved budget for the District to the President for transmission to Congress. Congress then reviews the budget and passes an appropriations act for the District.

The Mayor and the Council may set the maximum amount of funds to be allocated to the Board, but "may not specify the purposes for which such funds may be expended or the amount of funds which may be expended for the various programs under the jurisdiction of the Board of Education."[343] Consistent with this provision, the Code, in a pre-Self-

342/ §§442, 446, 452, Code §§47-224, 31-104-1 (Supp. III 1976).

343/ §452, Code §31-104-1 (Supp. III 1976).

Government Act section, grants the Board the power to "direct expenditures."[344] However, the Code also specifies that "all expenditures... shall be made and accounted for as now provided for law under the direction and control of the [Mayor]."[345] Because of the supremacy of Article IV of the Self-Government Act over conflicting provisions of the Code, we conclude that the Mayor and Council in the exercise of their "discretion and control" of Board expenditures cannot "specify the purposes for which [Board] funds may be expended or the amount of funds which may be expended."[346] Nevertheless, since the Mayor has ultimate responsibility for disbursement[347] of and accounting[348] for appropriated funds, the Mayor's "discretion and control" can be interpreted to mean that the District government must take the necessary administrative steps to implement Board decisions about expenditures for the public schools, can impose reasonable fiscal and accounting procedures and standards, and can insure that appropriations are not exceeded. In other words, the Board, not the Mayor or the Council, is authorized to determine how funds for the public schools are to be spent. Moreover, in addressing this authority, none of the statutory requirements prohibits decentralized

344/ Code §31-103 (1973).

345/ Id.

346/ Self-Government Act §452, Code §31-104-1 (Supp. III 1976).

347/ Self-Government Act §448, Code §47-226 (Supp. III 1976).

348/ Self-Government Act §449, Code §47-227 (Supp. III 1976).

budgeting.

Since there is no prohibition on Board delegation of budgetary functions, we conclude, based on the analysis of Part One, that no presumption against delegation would attach to the budgetary process.[349] However, the Board is responsible for submitting a total budget for the system to the Mayor, the Council, and the Congress and, accordingly, must give approval to the school system's budget before such submission. Because of the Board's final approval of the budget, substantial decentralization to the school or regional level with respect to budget priorities would probably cast local boards or staff as advisory, i.e., making recommendations to the Board. In addition, because of the need to retain ultimate control and to allocate resources fairly, as well as to comply with certain legal mandates, the Board would have to establish the general parameters of local discretion with respect to school budgets. Of course, many such parameters currently exist, e.g., teacher certification requirements and salary schedules.

Our conclusion concerning decentralization of budgetary functions is reinforced by the current Board practice of delegating budget formulation to staff, and by repeated expressions by the Board and superintendents

349/ Cf. 57 Geo. L.J. 997 supra note 37 at 1019.

concerning the desirability of decentralized budgeting.[350] In addition, Board contracts with the boards for the Adams and Morgan schools and the Anacostia Community School Divisions specify that those local boards are to exercise their discretion concerning budgetary matters pertaining to their schools, within Board policies and rules and other legal constraints. Because the Board must review and approve the budget recommendations of these local boards when the Board includes their requests in the school system's total budget, we are of the opinion that this procedure is not likely to create substantial delegation problems.

3. Limitations on the Exercise of Decentralized Budgetary Authority

a. Introduction

While the Board has general authority over the budget process,

350/ The community was invited to participate in the budget process for fiscal year 1971. In January 1972, the Board of Education approved a policy directing the Superintendent to implement a program of local school budgeting phased in on the elementary school level. The Superintendent established a "Task Force on Local School Budgeting" to implement this policy. In April 1972, the Superintendent recommended that school-by-school budgeting procedures be instituted "so that each principal, together with staff and members of the community, could review the needs of the school and request teaching positions that would best suit those needs" (Baratz, supra note 2 at 83-84). The Board approved this policy and made certain changes in its budget procedures to accommodate it. For example, while previous Board budgets submitted to Congress itemized teaching positions by subject, the budget submitted in 1973 aggregated all elementary teachers, irrespective of subject, permitting greater choice within this budget category for local decisions. Difficulties developed, however, in the implementation of this policy due, at least in part, to the limitations of the D.C. school's information system. See generally Financing in D.C. Public Schools: A Budgeting and Planning Guide for the Citizen, D.C. Citizens for Better Public Education, Washington, D.C. (1971) at 24; Baratz, supra note 2 at 83-84; and P.R. 1-206 School Cost Center Reporting Resolution, Report No. 1, District of Columbia Council, Committee on Education, Recreation and Youth Affairs (June 25, 1976) at 5.

its discretion is not unfettered. The total amount of funds for education proposed by the Board is subject to revision by the Mayor, the Council, and the Congress.[351] After Congress appropriates funds for the District, including funds for education, the Mayor apportions funds for the Board. The Board then prepares a financial plan in line-item form. The amount of funds which can then be transferred between line-items is limited by statute.[352] Further limitations are the result of the court's order in Hobson v. Hansen[353] and the requirements of Title I, both of which mandate that pupil to staff and pupil to expenditure ratios be maintained within specific ranges in the District's schools.

b. Limitations on Decentralization Created by the Line-Item Requirement and the Necessity for Mayoral, Council and Congressional Approval.

The requirements that the Mayor, Council, and Congress approve the Board's budget and that it be in line-item form when submitted to Congress impose no limitations on the initial budgetary recommendations

---

351/ The Self-Government Act does not explicitly require that the Board's budget be in line-item form when presented to Congress; however, the Conference Committee report indicates that this procedure is to be followed. H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 73 (1973).

352/ This restriction on final transfers among line-items results from a statutory limitation on the Board's power to reprogram funds once budgeted for a particular line-item or program: "The Board may transfer, during the fiscal year, any appropriation balance available for one item of appropriation to another item or to a new program in an amount not to exceed $50,000." D.C. Law No. 1-36, §405, Code §31-1735(a) (Supp. III 197

353/ 327 F. Supp. 844 (D.D.C. 1971).

which local boards or staff may make. Their primary effect is to make initial Board approval tenuous, to require procedures be developed to reconcile the amounts of initially approved budget categories with those finally contained in the Board's financial plan, and to restrict later decisions involving the transfer of funds between line-items.

Given the line-item form of the financial plan, the role of local boards or staff in the budget process would be as follows. Initially, local boards and staff can, within prescribed parameters, make budget recommendations for approval and inclusion in the Board's system-wide budget. At this level, the line-item requirement should impose few, if any, problems, since the line-items of the school-level budget are determined by program and resource choices. If budget parameters set by the Board are followed by local boards, the subsequent aggregation of school budgets into a total budget for the system should be similarly unhampered. However, in the likely event that the total amount of the Board's budget is changed, the line-items of individual school budgets would also be affected. If local boards and staff are to have a role concerning the changes which are made in the local school's budget as a result of such budget modifications, procedures for accommodating this situation will have to be developed.[354/]

354/ One possible procedure might be to have schools indicate in their initial budget requests options and priorities for deletion if the budget is reduced at later stages of approval.

Once such changes have been made in the local school's budget, the line-item financial plan, together with the limitation on transfers of funds among line-items, does somewhat restrict the ability of local boards or staff to make modifications in a school's final budget to accommodate any subsequent changes in funding levels or to revise priorities. The effect of this restriction is difficult to predict for several reasons. First, line-item categories may be sufficiently broad that substantial program changes can be made to accommodate budget changes without funds crossing categories. Second, the financial plan line-items are generally for the system as a whole; consequently when, e.g., one school shifts funds from item A to item B and another school shifts from item B to item A, the net effect on the system-wide line-items for A and B may be a "wash." Furthermore, if the limit on budget item transfers were nearly exceeded, the Board could seek additional authorization to transfer funds across categories from the Council. Due to the variable nature of these factors, the role of local boards or staff in budget modification will vary accordingly on a case-by-case basis, although Board procedures developed to address this situation may impose general guidelines for local board or staff participation.

c. Limitations Imposed by the Equalization Requirements Hobson v. Hansen and Title I.

Any system of decentralized budgeting in the District of Columbia public schools would have to conform to certain resource allocation requirements mandated by the 1971 court order in Hobson v. Hansen (Hobson II), and Title I of the Elementary and Secondary Education Act (Title I). These requirements affect both the total amounts that must be expended for staff salaries in particular schools and the types of staff which must be paid for out of certain funds. Consequently, they require the Board to develop certain parameters for the amounts of funds which a school can receive for certain staff and the kinds of staff which must be provided at the school. The policy issues raised in constructing alternatives to these requirements are considered in a separate study prepared as part of this project.[355] Our concern here is with the limitations that the existing requirements place on decentralization.

The equalization order in Hobson II looks only at salaries and benefits (including longevity steps) of elementary teachers (including special subject teachers). It requires that the total salaries and benefits paid for all such teachers in each elementary school be within ± 5 percent of the mean salary and

355/ J. Baratz, Issues Concerning the Construction of an Equalization Plan for the Allocation of School Resources in the District of Columbia (Education Policy Research Institute of Educational Testing Service 1976).

benefits per pupil for such teachers in the District as a whole.[356] However, Hobson II does not require any particular pupil to staff ratios.

The resource equity requirements of Title I, referred to as the comparability requirements, impose limits on both expenditure and staff ratios at the school level.[357] Like Hobson, comparability includes only regular budget funds from its computations. Title I and other non-regular budget expenditures are excluded. However, unlike Hobson II, which compares each school against a system-wide mean, comparability only compares each Title I school with mean ratios for non-Title I schools as a whole. The Title I expenditure ratio is as follows: expenditures for the salaries of instructional staff (a broad category not limited to teachers)[358] in each Title I school must be at least 95% of the mean per pupil salary expenditure in non-Title I schools. The Title I instructional staff ratio is as follows: the ratio of instructional staff to pupils may not be significantly less favorable in Title I schools,

356/ This includes only salaries paid from the regular District budget and excludes Title I funds and all other funds not from the regular Congressional appropriation for the District. 327 F. Supp. at 863 .

357/ 20 U.S.C. §241(e)(a)(3), 45 C.F.R. §116a.26.

358/ Instructional staff, in addition to teachers, includes "principals consultants, or supervisors of instruction, librarians and guidance and psychological personnel; . . . aides, or other paraprofessional personnel including clerical personnel employed to assist such instructional staff members in providing such services" 41 F.R. 42921, Sec. 116a.26(b)(6). Exclusions from the normal determination of comparability are authorized in certain cases involving handicapped children or children with specific learning disabilities or where children of limited English speaking ability are enrolled full-time in special programs of bilingual education. See 41 F.R. 42922, Sec. 116a.26(j) (Sept. 28, 1976)

i.e., this ratio must be no higher than 105% of the same ratio in non-Title I schools as a whole.[359] While Title I examines a broader range of staff members than Hobson, its salary computations are more limited. The part of a teacher's salary which is based on longevity is excluded from Title I calculations and the employer's share of benefits is not considered.

The Title I instructional staff ratio of pupils to staff has no corresponding requirement under Hobson II. As a result, the ratio must be incorporated into any Board parameters for decentralized decision-making, but its terms do not appear to pose major problems of coordination with Hobson II.

In contrast, both Title I and Hobson II impose related but unidentical limitations on school allocations for staff salaries, which must be coordinated in a consistent and comprehensive manner into Board guidelines for local boards or local school staffs. Because the expenditure requirements of the two mandates are somewhat different, and because it is difficult to anticipate the extent to which these requirements might actually preclude schools or regions from making desired expenditure and staff choices, the degree to which these requirements and the corresponding Board guidelines would impose substantial limitations on local choice will ultimately have to be determined by actual experience.

Hobson II's expenditure requirement is the broader of the two

359/ 41 F.R. 42921, §116a.26(e)(1), (e)(2) (Sept. 28, 1976)

since it determines the range of total teachers's salaries and benefits in every elementary school in the District. The direct effect of Title I's salary expenditure requirement is only on Title I schools. Instructional salaries per pupil in each Title I school cannot fall below the mean for all non-Title I schools by more than 5 percent. However, variation in salary expenditures in non-Title I schools cannot be ignored, since this will affect the non-Title I mean, which is the basis for comparison with Title I schools.

How do the Title I and Hobson II expenditure requirements interact?[360] We will pinpoint important issues for decentralization. Since all elementary schools must comply with the Hobson II requirement, one reasonable place to begin the development of expenditure parameters for schools is to assign each elementary school the mean teacher's salary and benefits per pupil for the school system, multiplied by the number of "full-time equivalent" children in the school.[361] Such funds must actually be spent for teacher's salaries, but the mix of experienced and inexperienced teachers is of no direct concern to the Hobson II order.

But since Hobson II and Title I include somewhat different, albeit

360/ A more detailed discussion of this issue with specific examples of problems can be found in Baratz, supra note 2 at Ch. VI.

361/ The fact that teachers salaries are generally the single largest cost item in a school's budget also makes this an appropriate place to begin.

overlapping, elements in their salary expenditure calculations,[362] compliance with Hobson II does not automatically ensure compliance with Title I comparability. Consequently, in addition to specifying a lump sum for teacher's salaries to comply with Hobson II (the "Hobson lump sum"), the Board would have to develop another parameter, (perhaps a variable lump sum -- the "Title I lump sum") to conform to comparability requirements. The Hobson lump sum could only be used for regular and special subject teachers and the Title I lump sum could only be used for other instructional staff. The precise specifications of Title I lump sums are beyond the scope of this analysis. Clearly, variables resulting from teacher turnover, hiring and transfer policies and current deployment of staff, such as the amounts of longevity pay received by teachers in particular schools would have to be considered,[363] and if longevity pay varies among schools, the Board would probably have to provide different Title I lump sums to different schools -- unless the Board would also require equalization of teacher senority among schools. Further, while the total pay including longevity steps and benefits of instructional staff members who are not teachers is not germane to either Hobson II or Title I expenditure ratios, the

362/ Hobson II includes only elementary teachers' salaries and benefits while Title I comparability includes the salaries of all instructional staff. But Title I only includes base salary, while Hobson II includes longevity steps and benefits as well.

363/ See discussion of such variable in Baratz, supra note 2 at 186-120.

Board, for budgetary reasons would undoubtedly want to develop a parameter for this item also.[364]

One additional point concerning these limitations should be noted. Since the salary expenditure requirement of Hobson II applies only to elementary schools, the Board has greater flexibility in allocating funds to junior and senior high schools. For this reason, the Board may wish to develop a separate set of parameters for elementary schools and for junior and senior high schools, where only Title I comparability requirements would apply.

B. Decentralizing Personnel Decisions

1. Introduction

Decentralization of personnel decisions pertaining to the appointment, transfer and dismissal of staff members are considered here.[365] We will not deal with other personnel matters such as licensing, other general eligibility requirements, and salaries and benefits since these are less likely candidates for decentralization.[366]

Clearly, local boards and administrators have a substantial interest in who teaches their children and provides support for their education. On the other hand, teachers have a substantial interest as

364/ Such a parameter need not be a ratio; it could also, for example, be a policy to provide a school with actual pay and benefits of such instructional staff returning to the school from the previous year, plus a dollar ratio for longevity pay for new school staff members.

365/ The discussion will focus primarily on teachers since they represent the bulk of school-level staff.

366/ The one exception perhaps is the issue of whether local boards and staff members could establish employment criteria in addition to, but not in conflict with, basic eligibility requirements.

government employees in being protected against arbitrary action and in being afforded due process where rights to property or liberty are at stake. The balance between a local board's interest (or the Board's interest -- from which local boards, at least in part, derive their authority) and the interests of teachers and other staff members varies depends on the type of personnel action involved. A teacher has few legally protected interests as a job applicant;[367] whereas, a teacher who has tenure or is under contract is entitled to substantial protection against dismissal without cause or other arbitrary action.[368] Consequently, decentralization of discretion concerning staff dismissal raises issues different from those raised by decentralization of staff appointments. Any decentralized discretion pertaining to termination must fit within the greater safeguards required for such action.

2. Limitations on Board Authority to Delegate Personnel Decisions

The major statutory provision governing the appointment, transfer and dismissal of school personnel is set forth in the Code:

> No appointment, promotion, transfer, or dismissal of any director, supervising principal, head of department, teacher or any other subordinate to the superintendent of schools, shall be made by the Board of Education, except upon the written recommendation of the superintendent of schools.[369]

367/ See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

368/ Id.

369/ Code §31-102 (1973).

The Code specifies that:

> The Board shall appoint all teachers in the manner hereinafter prescribed and all other employees provided for in this chapter.[370] (emphasis added)

Both of the above sections were part of the original 1906 Act. However, a later enacted section of the Code authorizes the Board, on the written recommendation of the Superintendent, to

> ... establish the eligibility requirements and prescribe methods of appointment and promotion [371] for teachers, school officers, and other employees.

One interpretation of sections 31-102 and 31-103 of the Code is that the Board itself must make staff appointments, transfers and dismissals.[372] However, later enacted section 31-1511(a), which authorizes the board to "prescribe methods of appointments," can be

370/ Code §31-103 (1973).

371/ Code §31-1511(a) (1973) (enacted in 1955).

372/ Congressional debate on section 31-102 of the Organic Act of 1906 indicates that Congress may have had in mind that the Board would exercise personal judgment with respect to applications for staff appointments. The following is taken from the House debates: MR. CLARK of Missouri:

> Why not put it in the bill that the superintendent shall make these appointments, transfers, promotions, and so forth without any operation of the board of education whatever?

MR. MORRELL:

> There may be one, two, three, four, five or six applicants eligible for a position. The superintendent of schools submits these applications to the board, endorsing certain of them. The board investigates and takes into consideration the qualifications of the different individuals endorsed by the superintendent and then acts upon the judgment of its members. In the opinion of the committee, it would not be wise that one individual should have the power of making the selection for all the teachers in the schools. (40 Cong. Rec. 5751, 59th Cong., 1st Sess., 1906).

interpreted to permit delegation at least of appointment decisions -- as one "method of appointment." At the very least, the Board's power to delegate discretion with respect to personnel actions under these sections is ambiguous.

As discussed below, these sections have not been viewed in recent years as prohibiting delegation of personnel actions or as requiring an opportunity for the superintendent to personally make a recommendation concerning personnel decisions. In fact, in most personnel actions taken in the D.C. schools both the superintendent's authority to recommend and the Board's powers to take personnel actions have been delegated and this has been viewed as necessary, given the number of such decisions which must be made each year. Moreover, the superintendent's recommendation is at most a procedural requirement, which has never been held to prohibit the Board from specifying additional procedures and requirements pertaining to personnel actions.

The D.C. courts have not considered the Board's authority to delegate personnel actions for over 40 years. In 1922 a D.C. court in Coleman v. District of Columbia stated in dictum, that the Board could not delegate the power of appointment.[373] As discussed in a previous section,[374] the court in Coleman applied the ministerial-discretionary test

373/ 51 App. D.C. 352, 279 F. 990 (1922) discussed at pp. 55-56 supra.

374/ See pp. 55-56 supra.

for subdelegation. Its dictum has been ignored in later cases decided in the D.C. courts.[375] Moreover, this test has been rejected by the federal and some state courts in favor of a more reasoned approach which considers the extent of delegation, the interests served and affected and safeguards against arbitrary action.[376]

In 1967 the superintendent reported to the Board that over 19,000 Board orders concerning personnel actions were processed through the Board of Education during fiscal year 1966, and that there was no way in which the Board could have "enough knowledge of the person to justify individual action."[377] The report also noted the loss of services which would result from having to delay appointments until Board meetings. Consequently, the report recommended delegation of most personnel matters to the superintendent and staff in order to conserve Board time for major policy matters. On June 21, 1967, and October 18, 1967, the Board of Education approved a recommendation of the Committee on Personnel to delegate authority to the superintendent to appoint all staff members excepting those in positions above TSA-8 and GS-12, contingent upon a favorable opinion by the D.C. Corporation Counsel concerning the legality of the Board's delegation.

375/ See e.g., Brown v. Tobriner, 218 F. Supp. 754 (D.D.C. 1963) and Green v. Silver, 207 F. Supp. 133 (D.D.C. 1962) discussed at pp. 51-60 supra.

376/ See pp. 76-91 supra.

377/ Report dated June 19, 1967 of Superintendent Carl F. Hansen to the Committee on Personnel of the Board of Education

In addition to employment, several other types of actions were authorized to be processed by administrative action without final Board Action: change of name; salary placement based upon the receipt of evidence of creditable service; leave of absence not requiring a waiver of the rules; transfer in assignments between grade levels or positions in the same class requiring different licenses; and correction of errors. The power to dismiss was not delegated.

The Corporation Counsel's opinion, without analysis of the case law pertaining to delegation and subdelegation, conceded that based on the Code provisions governing the Board's power in this area,[378] "it would appear that the Congress has directed that the Board of Education itself exercise the cited personnel functions."[379] However, Corporation Counsel argued that "these requirements for final action by the Board have been superseded by provisions of the Administrative Expenses Act of 1946 which are now incorporated in Title 5 United States Code... [Sections 302 and 5721]." Section 302 of Title 5 authorizes the head of an agency to

378/ Code §§31-102, 31-103, 31-106, 31-1532

379/ Opinion dated October 5, 1967 of Corporation Counsel to the Commissioners of the District of Columbia with respect to "authority of the Board of Education to delegate the function of taking final action on matters pertaining to employment, direction, and general administration of personnel."

"delegate to subordinate officials the authority vested in him... to take final action on matters pertaining to the employment, direction and general administrator of personnel under his agency"; the term "agency" in that act included the "government of the District of Columbia."[380] Since the school system is part of the government of the District of Columbia and the Board of Education is the "head of an agency" within the D.C. government, the Corporation Counsel concluded that the Board is authorized "to delegate the taking of final action" on the personnel matters specified above.

Subsequently, the Board approved an amended report dated October 18, 1967 of the Committee on Personnel which recommended that authority be delegated to the administration to appoint all staff in positions below TSA-8 and GS-12, and this 1967 opinion of Corporation Counsel has been the basis since that time for substantial subdelegation of personnel matters.[381] We believe that a strong argument can be made that delegation of such personnel action should also be approved

380/ 5 USC §5721.

381/ For example, current Board Rules, Chapter II, Section 200.3(h) specify

> The Superintendent shall recommend in writing the appointment and promotion of all officers, teachers, and other subordinate to him and all other personnel changes and actions, except where he has the delegated authority to take final action without prior Board approval. Such actions shall be reported by the Board for its information as its next stated regular meeting. (emphasis added)

under modern federal doctrine pertaining to subdelegation. Necessity alone would appear to justify this result, since it is unlikely that Congress would reasonably expect the Board to exercise intelligent judgment with respect to over 19,000 personnel actions each year.

Another issue is the role of the superintendent's recommendation in personnel actions. Congress appears to have intended this recommendation to be a procedural step which in no way bound the Board to accept the superintendent's judgment.[382] While a D.C. court overturned the Board's dismissal of a staff member for failure to obtain a written recommendation of the superintendent,[383] other opinions have indicated that the Board need not leave the superintendent with any discretion about whom or what disposition to recommend. The Board can, by rule, specify conditions which make a particular recommendation by the superintendent mandatory.[384] Moreover, in current practice many personnel decisions, including appointments, are made by subordinates without any recommendation by the superintendent[385] -- apparently in recognition of the fact that no single person is capable of exercising

382/ See note 107 supra; 57 Geo. L.J. 992, 1024 supra note 37.

383/ Whitwell v. U.S. ex rel Selden, 61 App. D.C. 169, 58 F.2d 895 (1932).

384/ U.S. ex rel Cromwell v. Doyle, 69 App. D.C. 215, 99 F.2d 448, cert den'd, 306 U.S. 640, rehearing den'd, 306 U.S. 669 cf, U.S. ex rel Denney v. Callahan, 54 App. D.C. 61, 294 F. 992 (1924).

385/ See discussion pp. 166-167 infra.

intelligent discretion with respect to thousands of personnel actions.

In summary, the sections of the Code which appear to restrict Board delegation of personnel actions have been considered superseded by a later enacted statute authorizing delegation of such decisions. This interpretation by Corporation Counsel has not been tested in court; however, even if it were found to be faulty, modern doctrine pertaining to subdelegation may support the Board's practice of substantially delegating personnel actions, based on the sheer number of decisions to be made. Both this precedent and current practice indicate that the Code does not prohibit the Board from delegating substantial discretion with respect to personnel actions to local boards and staffs.

3. Board Delegation of Authority With Respect to Particular Personnel Actions

a. Staff Appointment

The Board appears to have completely delegated to staff the authority to appoint teachers who meet general eligibility criteria. The superintendent's power to recommend has been similarly delegated and merged into the staff's discretion concerning whom to hire. Our understanding of the appointment process is that the personnel office reviews applicants' credentials to determine if eligibility requirements are met. Based on notices of openings submitted by regional offices, the personnel office refers qualified applicants to the regional office where they are interviewed.[386] Which among the qualified applicants to hire is determined

386/ Occasionally principals and parents at the school level interview applicants. We are informed that this commonly occurs at the Adams and Morgan schools pursuant to their decentralization agreements with the Board.

by the staff of the regional office (perhaps in consultation with building principals).[387] Appointment papers are then signed and the teacher is sworn in by staff in the personnel office. In the normal course of affairs, the superintendent does not make recommendations concerning which staff to hire, nor does the superintendent's personal approval precede appointment.[388]

In light of current practice, decentralization of decisions concerning staff appointment would merely introduce a new group of subordinates into an already decentralized process, raising few new issues of delegation. Local boards and staffs clearly have a substantial interest in choosing teachers and other staff who are compatible with their education programs and the needs of their children.[389] Since the choice among qualified applicants is now made on the basis of interviews, little would likely change except those doing the interviewing.

Outlined below are two possible methods for decentralizing staff appointments. Both incorporate a formal role for the superintendent's

387/ The Code requires teachers, heads of departments, principals and supervising principals to pass "an examination prescribed by the board of examiners" (Code §31-114). Formal examinations are no longer administered, a review of qualifications by the Personnel Office and the interview process now serving in its stead.

388/ Present Board rules reflect Board delegation of personnel action to the superintendent, but they do not reflect a delegation to the director of the personnel department and other staff to make personnel decisions -- unless such staff can be said to act for the superintendent. In fact, the Board's power of final action and the superintendent's authority to recommend have both been delegated to subordinates.

389/ Of course the Board must safeguard against discrimination based on race, sex, religion or other unlawful basis.

recommendation, even though present procedures do not. Both envision that the central personnel office would screen applicants to determine which meet eligibility and certification standards.

Under the first approach, the power of appointment would be delegated to local boards and staff. Based on central personnel office screenings the superintendent would recommend, in writing, a certain number of qualified applicants for appointment to local boards and staff who would then interview the applicants, select those desired, and exercise their subdelegated power of appointment.[390] In the case of the selection of a school principal, the superintendent could recommend qualified applicants to the local board and regional administrators.[391]

The second approach would involve a subdelegation, not of the power to appoint, but rather of the authority to recommend that certain applicants be hired, from among a pool of qualified applicants referred

390/ Local boards or administrators could also have the option of referring persons whom they considered qualified to the personnel office for a determination of their eligibility.

391/ We have not made a distinction among the various levels or classes of personnel that might be appointed through an exercise of subdelegated appointment authority. The Board did make such a distinction in its earlier subdelegation to the Superintendent by reserving to itself the power to appoint anyone above the levels of TSA-8 and GS-12 (this includes principals). A similar distinction has been carried over into new Board Rules governing "School Officer Hiring and Promotion" (Chapter 9, Section 11). We are of the opinion that the power to appoint school based staff such as principals could also be subdelegated under the rationale of this analysis. However, a court might conclude that it was reasonable for the Board to reserve an opportunity for the exercise of personal judgment respecting the appointment of the more limited number of higher administrative employees, e.g., principals. Consequently, we recommend that the Board indicate its approval of the applicants for such positions selected by local boards.

by the central personnel office. Local boards and staff would interview qualified applicants and select those they wished to have hired. A recommendation to this effect would be made to the central personnel office which would form the basis of the superintendent's recommendation. The Board would then perform the formal act of appointment.[392] This second approach is similar to that now used by Adams and Morgan Community School Boards and the Anacostia Community School Division.[393]

In a previous section, the impacts of the Hobson II equalization order and the Title I comparability requirement on decentralized budgeting were considered. Here we discuss what effects they would have on decentralized personnel decisions, particularly related to the parameters which the Board must establish in this regard.

Funds allocated for the salaries and benefits of certified teachers, which an elementary school receives according to the Hobson equalization formula, must actually be used for such teachers.[394] Funds allocated,

392/ This second approach involves far less delegation of the power to appoint than is currently practiced in the D.C. schools, and illustrates that almost wholly decentralized decisions can be made in a structure in which those decisions would be considered only advisory.

393/ For example, under the Board's agreement with the Morgan Community School Board the local board "determine[s] the number and kind of personnel (including itinerant and non-itinerant) that will be hired within the funds allocated to the Morgan Community School, and will recommend its staff to the Department of Personnel through the liason person." (¶6)

394/ Although teachers aides were included in one year by the Board in Hobson II compliance calculations (Baratz, A Quest for Equal Educational Opportunity, supra note 2; the opinion refers only to "teachers salaries and benefits" (327 F. Supp. at 863). However, the court did not foreclose the Board from seeking a modification of the order, e.g., to include all teaching staff in the ratio (327 F. Supp. at 864).

but not used, for teachers' salaries could not be included in that school's Hobson II equalization ratio, and might throw the school out of compliance. However, Hobson II imposes no restraint on the type or experience level of the teachers hired -- so long as the total amount of teachers' salaries and benefits are within the compliance ratio. In addition, the Hobson II ratio has no effect on the type, number, or salary levels of staff other than elementary teachers.

The Title I comparability requirement appears to impose even fewer restraints on staff appointments. The comparability ratios of (a) pupils to instructional staff members and (b) instructional staff salaries (less longevity) per pupil can be met with any type of instructional staff -- a category which includes a broad range of personnel.[395/] Because longevity steps are excluded, Title I comparability permits wide disparities among schools in total salary expenditures for instructional staff. In addition, individual school comparisons are made only for Title I schools; all non-Title I schools are lumped into the non-Title I staff and expenditure averages, which are the averages against which individual Title I schools are compared. To insure compliance with comparability, the Board need not be equally concerned in every school with deviations from expenditure and staff ratios. Rather, its primary concern must be to insure that Title I schools are not less favorably staffed (according to

395/ The types of staff included in "instructional staff" are described supra at note 358 .

comparability ratios) than the average non-Title I school; and that non-Title I schools are not disproportionately favored over Title I schools.

b. Staff Transfers

Decentralization of staff transfers is a more complicated issue than staff appointments for two reasons. First, more than one school is involved -- for each school transferring a teacher, there must be a corresponding school to receive that teacher. Second, the contract with the teachers' union limits the Board's right to transfer teachers and specifies the procedures to be followed.

The first constraint is more practical than legal. Presumably a local board or principal would have an interest in being able to involuntarily transfer staff viewed as incompatible with their children's needs or educational program -- short of finding cause for dismissal. However, in order for a transfer not to be tantamount to a dismissal there must be another school to which a transferred teacher can go. The receiving school obviously has an equal interest in the compatibility of the new person with its needs -- at the school level this would appear to be a situation requiring negotiation between sending and receiving schools. However, the Board might chose to delegate transfer decisions to the regional level so that regional staff or boards could determine transfers within the regions.

The same Code provision that governs appointments and requires a written recommendation of the superintendent also pertains to transfers.

However, transfers are apparently also effected by staff without such recommendations. The legal basis for such delegation has already been discussed.[396] The major issues for consideration here concern differences between voluntary and involuntary transfers and the provisions of the contract with the teachers' union.

(i) voluntary transfers

The requirements and procedures governing voluntary transfers are as follows: (a) a list of vacancies is made available, (b) requests for transfers are submitted to the Personnel Office which reviews the teacher's certification eligibility for the vacancy, (c) requests are forwarded to the appropriate assistant superintendent, (d) "if two or more equally qualified teachers indicate the same choice of school, system-wide seniority shall be the significant factor in determining which teacher is selected for the position", and (e) certification requirements for the position must be met prior to transfer.[397] The major issue for decentralization is whether local boards and staff can determine whether teachers are "equally qualified." The contract is unclear about whether teacher qualifications are to be determined merely on the basis of paper qualifications, e.g., degrees, or certificates, or whether judgments about past performance and the schools needs may also be used as

396/ See pp. 159-166 supra.

397/ Board contract with the Washington Teachers' Union approved October 1976, Art. IV.

criteria in the determination. While we are unaware of the intent of the parties to the contract, there can be little question that paper credentials give an extremely incomplete view of whether two teachers are equally qualified, i.e., past performance and school needs would appear highly relevant.

If, in fact, the voluntary transfer procedure anticipates more than merely a review of paper qualifications, there is clearly a role for local boards and staff in determining or recommending which staff are most qualified from among those applying to transfer to the school, and which staff should be accepted to fill the school's vacancies.

Furthermore, even if senority were the only factor taken into account in voluntary transfers, the contract does not bar local boards and staff from interviewing personnel seeking to transfer to the school so that both the school and the applicant could make informed judgments about the transfer.

(ii) involuntary transfers

The agreement with the teachers' union also contains procedures governing the involuntary transfers of permanent teachers. These require notice, consultation, and reasons for the involuntary transfer. Disciplinary action cannot be a reason for an involuntary transfer.[398]

Since disciplinary action cannot be a basis for involuntary transfer, local boards and staff would probably not be able to initiate an

398/ Art. IV. B.2.

involuntary transfer for reasons of incompatability with the school's children or educational program.[399] Instead the primary reasons for involuntary transfers anticipated by the contract appear to be (a) to shift staff in response to changing enrollments and (b) to comply with the staff and expenditure equalization requirements of Title I and Hobson II.

The agreement with the teachers' union does not specify who makes the final decision regarding involuntary transfers. Therefore, some form of local preference concerning the staff lost or gained in an involuntary transfer might be possible and appropriate. This would permit the principal or the local board to review a proposed involuntary transfer prior to final approval. Once the amount of funds to be gained or lost by the school was known, the school could specify the staff services they would prefer to give up and those they would like to receive. In addition, while the shortness of time for accomplishing many involuntary transfers may limit the opportunity for schools to interview personnel they might receive in an involuntary transfer, the contract does not prevent this procedure.

c. Staff Dismissal

Local boards or staff clearly have significant interests in seeing staff that are incompetent or neglect their duties are removed from the

399/ Absent this contractual provision, involuntary transfers could probably be made without "cause" sufficient for disciplinary action. See 57 Geo. L.J. at 1028, supra note 37.

schools. Staff, on the other hand, have important and constitutionally protected interests in not being subject to arbitrary actions. Union contracts specify the procedural protections against arbitrary action in great detail, including grievance mechanisms which teachers and other staff must be afforded prior to disciplinary action or dismissal. Because the contractually required procedures appear to provide substantially greater protection than the minimum constitutional requirements of notice and a hearing,[400] discussion of constitutional due process issues is not warranted. The discussion here focuses primarily on the extent to which local boards and staff can play a role in the disciplinary and dismissal procedures specified by the contract with the teachers' union. In addition, we will consider the role of local boards and staff in determining whether probationary staff should have their contracts renewed or be given permanent status.

A threshold question is whether the Board has the power to delegate authority concerning staff dismissal to local boards and staff: what if there were no contractual constraints? Dismissal like other personnel actions is supposed to include a written recommendation of the superintendent,[401] but, as already discussed, this has not inhibited the delegation to staff of other personnel actions. Absent contractual constraints, we tend to agree with the authors of a Georgetown Law

400/ See cases cited note 367 supra.

401/ Code §31-102.

Journal article on decentralization that "[a]s long as the local administration and community board have 'good cause' and observe the teacher's statutory due process rights, there is no logical reason why they should not be able to exercise the firing power."[402] Indeed, the Board under its present agreement with the teachers' union has now completely delegated to a third party arbitrator the decision whether to dismiss a teacher for cause in certain circumstances.[403] However, because of the substantial staff interests involved, courts may require approval, or at least an opportunity for review, by the Board of local board dismissal decisions.[404] Of course, delegated decisions which are approved by the Board are likely to be characterized as only recommendations which the Board acted on, and as not raising delegation issues. The extensive role which subordinates can play in the hearing process, even when final decisions are made by the agency head, has been discussed, e.g., hearing and reviewing evidence, making findings, and recommending decisions.[405]

(i) local board and staff role in contractual dismissal procedures.

Chapter X of the Board Rules specifies "just cause for adverse

402/ 57 Geo. L.J. at 1027, supra note 37.

403/ Contract Art. VI. 2.a. Step 4. Since arbitrators, unlike local boards, are not under the control of the Board, this provision involves more extensive delegation than that considered here.

404/ See discussion at pp. 78-79, 128-130 supra.

405/ See discussion pp. 74-75 supra.

personnel actions."[406] Chapter X also incorporates detailed procedural steps to be followed in dismissals, suspensions, and demotions. However, these procedures do not apply to "employees within recognized bargaining units with which an agreement on grievance procedures has been ratified."[407] Consequently, dismissal actions against teachers, whose union contract has an agreement on grievance procedures, are governed by the contract rather than Board Rules[408] -- except for the definition in the Rules of just cause, which applies to all employees.

The teachers' contract approved in October 1976 specifies the procedures for disciplinary actions involving suspensions of five days or more or discharge.[409] In general this requires written notice of the proposed action with reasons and an opportunity for reply in writing or in person, with supporting statements. The "responsible official" makes the decision and written notice is given to the employee. An adverse decision in a disciplinary action can be appealed by the employee or the

406/ "Board Rules, Ch. X, Sec. 2.2." Just cause may include, but is not limited to, ... (a) Gross inefficiency, (b) Grave misconduct in office, (c) Incompetence..., (d) Willful non-performance or neglect of duty, (e) Insubordination, (f) Violation of the rules, regulations, or lawful orders of the Board..., (g) Refusal to submit to a mental or physical examination required by the Board... or by the government of the District..., (h) Conviction of a felony."

407/ Board Rules, Ch. X, Sec. 1.3.

408/ At the time this chapter of the Rules was drafted, the contract with the teachers union contained no provisions on disciplinary actions. As a result disciplinary actions and dismissal were handled through the grievance mechanism (Art. VI). However, the contract approved in October 1976 specifies procedures for disciplinary action (Art. VII).

409/ Contract, Art. VII. A.

union through the contract's grievance and arbitration procedure.[410]

The contract grievance and arbitration procedure consists of four steps. The first step is a discussion between the immediate supervisor and the teacher; the second, a written grievance and a written decision involving the same persons as step one; the third, a written grievance to the superintendent and written decision from the superintendent or his designees; and the fourth, which can only be invoked by the union, is binding arbitration in the form of a hearing and written decision by an outside arbitrator.[411] Since the disciplinary action provision is new, it is unclear at what step of the grievance procedures a review of a disciplinary action begins. While we are informed that the parties intend this review to begin at step 1 of the grievance procedures, logically, this review should begin at step 3 rather than going back to the informal discusssions of step 1-- presumably, etc.

Given this framework, the major issue for decentralization concerns the role which local boards and staff can properly play in these contractual procedures. Several alternatives, which may operate either alone or in concert, are set out below.

410/ Contract, Art. VI. This is not explicit in the contract, but we are informed this is the intention of the parties.

411/ Under the contract "the decision of the arbitrator shall be final and binding... only with respect to grievances concerning the interpretation or application of the specific terms of this agreement." (Article VI. 2.a. Step 4(c). The scope of this delegation with respect to dismissal actions is unclear.

First, it would appear that a local board could be involved in the initiation of disciplinary action since the contract is silent on who initiates such action.[412]

Second, a local board and staff could participate in the initial decision at step 2. The first decision in a disciplinary action is made by "the responsible official," a term which is not defined. It appears likely this term was left general to permit the Board to designate the responsible official in particular situations. Insofar as delegation to local boards is permissible, a local board member, perhaps the chairman, could be designated as the "responsible official"; alternatively, so could the school principal. Since ample opportunity for review and additional hearings are provided by the grievance and arbitration procedure, there appear to be ample safeguards against arbitrary action.

The local board could also participate at step 3 of the grievance and arbitration procedure, since the employee is to meet with the "Superintendent, or his designee, and those he may further name."[413] The decision at that step can also be made by the superintendent's "designee."[414]

412/ The contract does make it difficult for local boards to participate directly in teacher evaluations, which may form the basis of a charge of incompetency (see Art. XVII). However, boards could encourage principals to use such evaluation procedures. Furthermore, there is no reason why such action must be based solely on the principal's evaluations.

413/ Art. VI. B.2.a. step 3.

414/ One possibility would be to designate the school principal the responsible official for making the initial decision in the disciplinary action and the local board as the superintendent's designee in step 3.

Thus, the contract with the teachers' union appears to preserve Board discretion to designate who will make decisions on its behalf in disciplinary and dismissal actions, and does not bar the Board from involving local boards and staff in such decisions.

(ii) local board and staff role with respect to the status of probationary employees.

After appointment, a new employee in the school system generally serves a two year probationary period.[415] While the Code specifies that probationary employees may be dismissed by the Board "upon the written recommendation of the Superintendent at any time during the two year probationary period,"[416] the procedural protections of the teachers' contract covers "all" teachers.[417] Thus, the dismissal of probationary teachers is subject to the same procedures that pertain to permanent staff.

At the end of two years, the Board must decide whether to grant permanent status to probationary teachers on the basis of "satisfactory" completion of the probationary period.[418] The Board currently approves staff recommendations for permanent tenure.[419] Delegation of at least initial decisions concerning permanent status to local boards and

415/ Code §31-1512(a)

416/ Code §31-1533(c)

417/ Contract, Art. I. A.1.

418/ Code §31-1512(a)

419/ Superintendent's Circular No. 2, July 20, 1973, "Procedures for Processing of Recommendations for Permanent Tenure."

staff can be readily justified, since local boards and staff are in a particularly advantageous position to know how well a staff member has performed during the probationary period. However, greater safeguards against arbitrary action than in the case of the initial appointment are warranted for decisions concerning permanent status. Consequently, it would be preferable for the Board or superintendent to review initial local board and staff decisions concerning whether to confer permanent status.

Another issue pertains to the method of evaluation of probationary staff. The union contract specifies that probationary teachers shall be evaluated by the same standards as permanent teachers. As discussed, local boards are limited in their direct participation in teacher evaluations under the contract.[420] However, in making decisions concerning permanent status the Board is not confined to the information contained in formal evaluation reports.[421] The Board's designee should be similarly unconfined, but must base a decision on sufficient information to make a reasonable judgment. All information on which a local board relied should be made available to the employee and to the Board or superintendent in any review of the local board's initial decision.

420/ See note 412 supra.

421/ This issue was extensively discussed in a legal opinion dated March 20, 1973 given to the president of the Board by the law firm of Arent, Fox, Kintner, Plotkin & Kahn.

D. Decentralizing Curriculum and Textbook Decisions

1. Introduction

Curriculum takes in a broad range of decisions and activities. It includes formal course and subject requirements, the textbooks and workbooks used, instructional equipment, supplementary readings, films, and teacher prepared materials. The curriculum can also encompass how a class is taught -- whether by lecture, discussion, research assignment, field trip, or by open or traditional classroom methods.

There is no prohibition in the Code directly restricting Board delegation of curriculum decisions.

2. Curriculum

The curriculum is a matter which falls within the Board's control by virtue of its authority to establish general policy.[422] The superintendent is given the "direction of and supervision in all matters pertaining to the instruction in all the schools under the Board of Education."[423] While this provides specific authorization for the Board to delegate curriculum decisions to the superintendent, the Board's authority to control and make general policy provides the basis for a Board policy to decentralize curriculum decisions to the school and regional levels. The superintendent would "direct" and "supervise" the implementation of this policy and

422/ Code §§31-101, 31-103 (1973).

423/ Code §31-105.

could be given the authority to review curriculum decisions made at the school or regional levels, with the Board retaining the ultimate authority to resolve conflicts.

In summary, the analysis in Part One suggests that since there is no specific prohibition on decentralization of curriculum decisions, the Board could through its rulemaking powers, define (1) the extent of subdelegated curriculum authority to be exercised by regional or school based administrators and local boards and (2) the relationship between this decentralized authority and the superintendent's authority. Our analysis is reinforced by the fact that many of the curriculum matters listed above are today directed by school level staff, i.e., principals and teachers. A Board decision to grant curriculum authority to local boards and staff would, in large part, formalize and provide structure for curriculum decisions which are now diffusely decentralized on an ad hoc basis.

3. Textbooks

There are greater formal limitations on the delegation of decisions concerning textbooks in particular. The Code permits the Board to purchase for use in the public schools "only such books and supplies as shall have been duly recommended by the Superintendent of schools and formally approved by the Board...."[424] This provision is more specific about such decisions being "formally approved by the Board" than other

424/ Code §31-404 (1973).

Code provisions we have considered, e.g., concerning personnel decisions.[425] Congress clearly intended formal Board approval of books, thereby prohibiting delegation of the final decision. However, local boards and staff could be authorized to make initial determinations about textbook selection which would be submitted to the superintendent for his recommendation and submission to the Board for formal approval. Where the superintendent and the local school disagree about books, resolution of the issue would be the responsibility of the Board.

4. Special Education

The Board is under federal court order in Mills v. Board of Education concerning (a) the procedures which it must use in order to take children from regular classroom assignment and place them in special education classes, and (b) the special education services it must provide to children who are excluded from regular classrooms.[426] Mills ordered that:

> no child eligible for a publicly supported education in the D.C. public schools shall be excluded from a regular public school assignment... unless such child is provided (a) adequate alternative educational services suited to the child's needs ... and (b) a constitutionally adequate prior hearing and periodical review of the child's status, progress, and the adequacy of the educational alternative.[427]

425/ Compare the textbooks provision Code §31-104 with the personnel provision, §31-102. See discussion, pp. 159-166 supra. We are informed that, in fact, Board approval of books is so sweeping as to constitute a complete delegation of decisions concerning book acquisitions.

426/ 348 F. Supp. 866 (D.D.C. 1972).

427/ 348 F. Supp. at 878.

The order is very specific concerning the hearing which must be held in order to exclude a child from a regular classroom assignment, if the explusion is questioned. Generally, the specificity of procedural requirements does not in and of itself restrict delegation,[428] since even detailed procedural requirements may be carried out on a decentralized basis. However, the requirement that the "Hearing Officer shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System,"[429] does restrict decentralization of special education decisions; both local board members and school staff are prohibited from serving as hearing officers. Consequently, the decisions, based on hearings, concerning the removal of particular children from the classroom and their placement in special education classes cannot be delegated to local boards and staff.[430] Hearings, however, are only held if parents or guardians object to their children's placement, transfer or denial of placement in a special school class. Does this mean that the Board could completely delegate decisions about special class placements to local boards and staff? Probably not. The Mills opinion indicates that such decisions should be based on "tests and reports" and that "expert medical, psychological and educational testimony" should be used in making placement decisions. This assumes a level of professional expertise not likely to be present at the school level. Consequently, final

428/ The contract with the teachers' union specifies detailed procedures for teacher discipline, which, as previously discussed, do not prohibit delegation. See discussion at pp. 174-180 supra.

429/ 348 F. Supp. at 881.

430/ Teachers and principals obviously may play a role in making such decisions since they are likely to provide information at such hearings.

placement decisions should be made at a level where such professional services are available, i.e., regional offices or the central administration.

Another issue concerning decentralization is whether Mills would permit schools or regions to decide what special education services will be offered to their children. Under Mills the central administration must insure that "adequate alternative educational services suited to the childs needs" are provided to children excluded from regular classroom assignments.[431] The school administration must bear the burden at the hearing required by Mills, not only with respect to classification, but also with respect to the suitability of the educational program it proposes for the exceptional child.[432] The school administration must be in a position to represent to the hearing officer that a certain educational program is actually available to the child in the school system, or else that the child will be provided with a tuition grant for private special education. Consequently, decisions concerning whether to provide special education services cannot be delegated to individual schools. The Board must insure that adequate services suitable for the exceptional children in the District are provided.

E. Decentralizing Decisions Concerning the Use of School Buildings

Decentralized decision-making about the non-school use of school buildings would enable local boards and staff to approve or deny requests

431/ 348 F. Supp. at 878.

432/ 348 F. Supp. at 881.

to use school buildings for non-school purposes.

The Code vests control of the use of school buildings in the Board of Education:

> The control of public schools in the public schools... shall... include... the use of the public school buildings... for supplementary educational purposes, civic meetings for the free discussion of public question, social centers, centers of recreation... The privilege of using said buildings and grounds for any of said purposes may be granted by the board upon such terms and conditions and under such rules and regulations as the board may prescribe. (emphasis added) 433/

The Board, under its rulemaking powers, has delegated to the superintendent the authority to "direct and be responsible for all matters pertaining to the use of buildings and grounds." 434/ Board rules do not specify how the superintendent is to carry out these responsibilities. However, the superintendent has apparently issued an administrative directive that requires approval from the central administration for non-school uses of school buildings.

433/ Code §31-801. The use of buildings is also qualified by the proviso that "... the public school buildings and grounds of the District of Columbia shall be used for no purpose whatsoever other than those directly connected with the public schools system and as further provided in this section and Section 31-801" (Code §31-802 (1973). Whatever restraints section 802 might appear to impose has been nullified by a later-enacted section of the Code which expresses a preference that school facilities and services "serve broad community needs," be designed "to accommodate civic and community activities" and be fully utilized during non-school hours for "community purposes." (Code §31-104b).

434/ Board Rules, Ch. II, §220.3(m).

The authority to issue rules is an accepted basis for delegation,[435] and supports the Board's current delegation of authority to contract the use of school buildings and grounds. We are of the opinion that it would also support delegation to local boards and staff. However, to mitigate the possibility of challenge to such delegation the Board should, by rule, establish standards and procedures to guide the exercise of delegated discretion and provide safeguards against arbitrary action.[436]

F. Decentralizing Decisions Concerning Building Maintenance

Under the Code, janitors "...shall do all minor repairs to buildings and furniture, glazing, fixing seats and desks and take care of the heating apparatus."[437] However, the general responsibility for maintenance of school buildings is vested, not in the Board, but in the Mayor. This maintenance responsibility has been subdelegated to the head of an

435/ See, e.g., Brown v. Tobriner, 218 F. Supp. 754 (D.D.C. 1963); Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111 (1947) and discussion at pp. 57-60, 72 supra.

436/ Decisions concerning the use of public auditoriums and other facilities by community groups raise First Amendment issues since courts are sensitive to discrimination in access to such facilities for speech and association purposes. See, e.g., Healy v. James, 408 U.S. 169 (1972); Wood v. Davison, 351 F. Supp. 543 (N.D. Ge. 1972); ACLU of Virginia, Inc. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970).

437/ Code §31-1105.

executive department under the Mayor, the director of the department of general services.[438] While school janitors are under the control of the Board, the department of general services personnel who perform most maintenance are not. The Board obviously cannot delegate decisions concerning building maintenance, since it cannot delegate a power it does not have.

It would further appear that the Mayor himself could not delegate to the Board of Education the responsibility for school maintenance now residing in the director of the department of general services. Rather, such delegation requires Council action. Under the Self-Government Act, the Mayor can delegate his functions to "any officer, employee, or agency of the executive department."[439] However, the Board is not part of the executive office of the mayor or of the executive department; it is an independent agency separate from the executive branch of the District government.

438/ Commissioner's Order (Organization Action) No. 69-96, dated March 7, 1969, as amended, provides, inter alia, that "The Director of the Department of General Services is responsible for ....construction, repair, and improvement of the physical plant of the District of Columbia and the operation and maintenance of multiple-use buildings and grounds...." See also Reorganization Plan No. 3 of 1967 Sec. 401 and Reorganization Order No. 42 of 1953, Part II.

439/ Self-Government Act §422(6), which authorizes the mayor to delegate his functions to any

> "officer, employee, or agency of the executive office of the mayor or to any director of an executive department who may, with the approval of the mayor, make a further delegation of all or part of such functions to subordinates under his jurisdiction."

Since the Self-Government Act is so explicit about those to whom the Mayor can delegate, a court might conclude that Congress did not intend that the Mayor delegate his functions to an independent agency such as the Board, without Council authorization.[440]

Thus, the Act and the Code impose no restriction on delegation of maintenance responsibilities performed by school janitors, but delegation of maintenance functions now lodged in the D.C. Government would appear to require Council action.

G. Decentralizing Decisions Concerning Supplies and Equipment

Decentralized decision-making about supplies and equipment would enable regional or school based administrators and local boards to exercise, within budgetary limitations, some degree of authority about the type, quantity and quality of supplies and equipment.

There are two legal impediments to Board decentralization of supplies and equipment decisions. First, the Code authorizes the Board to "purchase for use only such books and supplies as have been duly recommended by the Superintendent... and formally approved by the

440/ Under section 404(b) of the Self-Government Act the Council has authority "to define the powers, duties, and responsibilities of any office, agency, department, or instrumentality" [of the Government of the District]. Perhaps it could be argued that even the Council could not authorize this delegation since school building maintenance was formerly a function performed by the Commissioner, and section 422 of the Self-Government Act, which appears in Title IV (the District charter), specifies that "except as otherwise provided in this Act, all functions granted to or vested in the Commissioner... as established under Reorganization Plan No. 3 of 1967, shall be carried out by the mayor in accordance with this Act." (emphasis added). However, this provision appears intended to transfer to the Mayor functions performed prior to home-rule by the commissioner, rather than to express a limitation on the Council's legislative powers.

Board..."[441] Second, legal authority for procurement is vested in the Mayor and has been delegated to the department of general services.[442]

The general effect of the second limitation is that the Board must order most supplies and equipment according to procedures prescribed by the department of general services. Consequently, the Board can decide which supplies and equipment it wants, but cannot procure them independently.

The requirement that books and supplies be "formally approved" by the Board, as discussed in the section on textbooks,[443] appears to be a greater restraint on formal delegation than many other provisions found in the Code. However, supplies and equipment raise somewhat different issues from the issues raised by books. While it is likely that this section was designed to require Board approval for particular book titles, it appears unlikely that it contemplates more than generic approval of supplies and equipment. By way of illustration, whether construction paper in a particular classroom or school is blue or red or whether crayons or magic-markers are used do not appear to rise to the level of Board

441/ Code §31-404 (1973).

442/ Self-Government Act, Sec. 422(6); Reorganization Plan No. 3 of 1967, Sec. 501; and Commissioner's Order No. 69-96, as amended, which provides that the Department of General Services is responsible for "...development of standards and systems for procurement; purchasing and contracting for goods and services... and maintaining records of acquisition and disposal of all real and personal property owned by the D.C. Government." D.C. Code, tit. 1, app. (1973)

443/ See pp. 183-184 supra.

action. Therefore, Board formal approval of supplies and equipment by generic category should meet the requirements of the Code, and there appears to be no reason why decisions concerning the specific kinds, quantity and quality of approved categories of supplies and equipment cannot be delegated to local boards and staff. Nevertheless, decentralized decisions concerning supplies and equipment would still have to be funnelled through the procedures of the department of general services.

Any changes in this procurement arrangement would have to be authorized by the Council.[444] Any such authorization for the Board to procure supplies and equipment would have to be accompanied by the power to contract, since the Board currently lacks the authority to contract for supplies and equipment.[445] Due to this lack of procurement authority, we recommend that any question concerning Board power to delegate such authority be explicitly resolved by the Council in the event it votes authorization for the Board to procure supplies and equipment independent of the department of general services.[446]

444/ The discussion concerning delegation of maintenance functions pp. 188-190, supra is also applicable here.

445/ The District of Columbia Public Post-Secondary Reorganization Act of 1975 granted the Board contract authority only with respect to "services," (Code §31-1735 (Supp. III 1976)), pursuant to Council regulations (no regulations have yet been issued). However, the Act did not limit the Council's power to broaden the Board's authority to contract (Code §31-1736 (Supp. III 1976)).

446/ Since the Council has power to amend the Code, express statutory authorization for delegation by the Board in this area would supersede the present Code provision that the Board can only purchase supplies recommended by the superintendent and approved by the Board.